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Received *April 1, 1896.*









# THE INDIAN LAW REPORTS,

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## ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND  
BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON  
APPEAL FROM THAT COURT.

### REPORTED BY

Privy Council ... C. BOULNOIS, *Middle Temple*.

High Court, Allahabad ... A. STRACHEY, *Inner Temple*.

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VOL. XI.

1889.

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ALLAHABAD:

PRINTED AT THE GOVERNMENT PRESS,  
AND PUBLISHED AT THE GOVERNMENT BOOK DEPÔT,  
UNDER THE AUTHORITY OF THE GOVERNOR-GENERAL IN COUNCIL.

Rec. Apr. 1, 1896.

## JUDGES OF THE HIGH COURT.

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### CHIEF JUSTICE :

HON'BLE SIR JOHN EDGE, *Kt.*

### PUISNE JUDGES :

HON'BLE DOUGLAS STRAIGHT.

„ M. BRODHURST.

„ W. TYRRELL.

„ SYED MAHMOOD.



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THE  
INDIAN LAW REPORTS,  
*Allahabad Series.*

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APPELLATE CIVIL.

1888  
*July 5.*

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*Before Mr. Justice Straight and Mr. Justice Mahmood.*

RAHIM BAKHSH (DEFENDANT) *v.* MUHAMMAD WASAN (PLAINTIFF).\*

*Muhammadian Law—Gift—Hiba-bil-iwaz—Gift made in consideration of services rendered—Donor not in possession—Possession not delivered to donee—Gift invalid.*

The fundamental conception of *hiba-bil-iwaz*, or a gift for an exchange, as understood in the Muhammadan Law, is that it is a transaction made up of two separate acts of donation, *i.e.*, of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee. It does not include the case of a gift in consideration only of natural love and affection or of services or favours rendered. Nor does such a gift fall under the category of *hiba-bil-iwaz* to its improper sense of sale; but it is an ordinary gift subject to all the conditions as to validity which the Muhammadan Law provides.

A gift of immoveable property not at any time in the possession of the donor, but in that of a trespasser, and consequently never delivered by the donor to the donee, is void under the Muhammadan Law. *Kasim Hossein v. Sharif-un-nissa* (1), *Sahib-un-nissa Bibi v. Hafiza Bibi* (2), and *Shasikh Ibhran v. Shaikh Suleman* (3), distinguished. *Mohin-ud-din v. Manchershah* (4), *Mullick Abdool Guffoor v. Muleka* (5), and *Shahazadee Hazara Begum v. Khaja Hossein Ali Khan* (6), referred to.

The facts of this case are stated in the judgment of the Court.

The Hon. T. Conlan, Lala Latta Prasad, and Maulvi Mehdi Hasan, for the appellant.

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\* First Appeal, No. 151 of 1887, from a decree of Maulvi Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 20th June, 1887.

(1) I. L. R., 5 All., 285.

(4) I. L. R., 6 Bom., 650.

(2) I. L. R., 9 All., 213.

(5) I. L. R., 10 Calc., 1112.

(3) I. L. R., 9 Bom., 146.

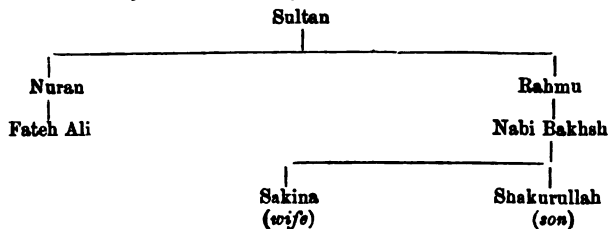
(6) 12 W. R., 498.

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Mr. G. E. A. Ross, Mir Zuhur Husain, and Munshi Madho Prasad, for the respondent.

MAHMOOD, J.—The facts of this case are very simple, and the decision of the appeal rests upon the principles of the Muhammadan Law of gift, which admittedly governs this case. The relative position of the persons to whom reference will be necessary is indicated by the following table:—



It is admitted that the property to which this suit relates was originally owned by Nabi Bakhsh, who died in the year 1876, leaving a widow, Musammat Sakina, and a son, Shakurullah, as his heirs under the Muhammadan Law.

Shakurullah died on the 12th July, 1881, leaving his mother Musammat Sakina and Fateh Ali, who (as the pedigree shows) was his father's paternal uncle's son, and as such entitled to inherit a share in the estate of the aforesaid Shakurullah.

It appears that upon the death of Shakurullah, his mother Musammat Sakina, having a right of inheritance partly by inheritance from her husband Nabi Bakhsh, and partly by inheritance from her son Shakurullah, remained in possession of the entire property up to the time of her death, which occurred on the 25th March 1883.

Subsequently, that this on the 4th May, 1883, the aforesaid Fateh Ali (whose name appears in the pedigree) executed a deed of gift, whereby he purported to convey all such rights of inheritance as he might have in the property to Muhammad Hasan, plaintiff-respondent.

In consequence of this deed of gift certain quarrels arose between the plaintiff and the defendant as to the mutation of names

in respect of the zamindari portion of the property, but the plaintiff's claims were rejected by the revenue authorities on the 22nd November, 1883, and the defendant appears to have maintained his possession of the entire property, which, as before said, had come into the possession of Musammat Sakina, widow of Nabi Bakhsh and mother of Shakurullah. Fateh Ali died on the 29th August, 1884.

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The present suit was instituted on the 25th September, 1886, by Muhammad Hasan, plaintiff-respondent: and in order to clear the case of possible confusion it is necessary to state that the suit rests entirely upon the deed of gift of the 4th May, 1883, and that the plaintiff claims the property as the share which the donor Fateh Ali is said to have inherited from Shakurullah and to have gifted to the plaintiff under that deed; that there is no allegation in the plaint that Fateh Ali ever obtained possession of the share which he claimed to have inherited from Shakurullah; and that therefore the plaintiff's suit will fail if the gift upon which he relies is found to be invalid under the Muhammadan Law.

The grounds of appeal and the arguments which have been addressed to us on behalf of the parties raise only two main questions for determination:—

(1) Whether the gift of the 4th May, 1883, was a *hiba-bil-iwaz*, or a gift for an exchange as understood in the Muhammadan Law, rendering delivery of possession of the gifted property unnecessary for the validity of such gift.

(2) If not, was the gift of the 4th May, 1883, valid under the Muhammadan Law in view of the circumstance that the donor Fateh Ali was never in possession of the gifted property either at the time of the gift or at the time of his death, and that, as a matter of fact, the plaintiff, donee, never obtained possession of the property which he claims under the gift?

The view of the law which I entertain upon these two questions renders it unnecessary for me either to consider the question as to the exact extent of the share which the donor Fateh Ali may have

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inherited from Shakurullah, or to decide the question of fact raised in the seventh ground of appeal relating to the house in Jafra Bazar, which is alleged by the appellant to have been built by himself. Nor is it necessary to consider the question raised by the plea that the defendant-appellant had spent a large sum of money in performing the several ceremonies of Shakurullah, and that such money was a charge upon the estate which the plaintiff was bound to pay before claiming any share in the estate.

In dealing with this case I shall confine myself to the two points above mentioned, because according to my opinion the decision upon those points will be fatal to the plaintiff's whole suit.

In considering the first of those points it is necessary to examine closely the terms of the deed of gift, dated the 4th May, 1883, executed by the deceased Fateh Ali in favour of the plaintiff-respondent Muhammad Hasan. That deed, after making certain recitals as to the manner in which the donor felt himself entitled to inherit a share in the estate of Shakurullah, goes on to say :—

“I, the executant, have now become old and weak and have no issue. Sheikh Muhammad Hasan, a near relative of mine, has all along, with cordial affection and love, rendered service to me, maintained and treated me with kindness and indulgence, and shown all sorts of favours to me. Besides the above the executant cannot attend even to the necessary management of the said share.

Therefore for this reason, as also in consideration of the natural love and affection which Muhammad Hasan bears, as well as for all the past favours and indulgence shown by him, I, the executant have, with my free will and consent, and in sound state of body and mind, without coercion or restraint, transferred and given away to Muhammad Hasan my entire share in the estate of Muhammad Shakurullah specified below, which devolves upon me as a residuary heir, together with all the zamindari rights appertaining thereto. For my heirs have now no connection with the aforesaid share. Sheikh Muhammad Hasan is the absolute owner of the said share from this date, and he is authorized to get his name entered in the revenue department on the strength of this deed

and take possession of the property transferred. He should spend out of his own pocket what is necessary for the purpose of bringing any suit in connection with the share. I, the executant, shall not be liable for it, nor have I any claim in respect of the share transferred. If in present or in future any claim in respect of the said share be made under the Muhammadan Law or otherwise by me or my heirs contrary to this deed and to the transfer in favour of Sheikh Muhammad Hasan aforesaid, it will be held false and unentertainable. The value of the property transferred is Rs. 7,500. These few words have therefore been written by way of a deed of transfer that they may be of use in time of need."

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In interpreting this document, the lower Court has held that "it is a deed of gift executed in exchange of services," and that "the word *iwas* (exchange) includes service, and a gift in exchange of services cannot be revoked." Upon this ground the Court has held that "Fateh Ali, not being in possession of the subject of gift, which had been left by Shakurullah, could not deliver the possession thereof to the plaintiff," but that this circumstance would not render the gift invalid.

I am of opinion that the learned Subordinate Judge has taken an erroneous view of the Muhammadan Law in holding that the transaction of the 4th May, 1883, was a *hiba-bil-iwas*, or gift for an exchange. The real nature of a *hiba-bil-iwas* is fully described in Chapter VI of Book VIII on Gift in Mr. Baillie's Digest of Muhammadan Law, which is only an abbreviated reproduction of the Fatwa Alamgiri; but I need only refer to such passages as have an immediate bearing upon this case. The fundamental conception of a *hiba-bil-iwas* in Muhammadan Law is, that it is a transaction made of two separate acts of donation, that is, it is a transaction made up of mutual or reciprocal gifts between two persons, each of whom is alternately the donor of one gift and the donee of the other. "The *iwas*, or exchange, in gift, is of two kinds—one subsequent to the contract, the other stipulated for in it—" (Baillie's Digest, 2nd ed., p. 541). "When the exchanging takes place subsequent to the gift, the *iwas* is, without any



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difference of opinion between our masters, a gift *ab initio*. So that it is valid, where gift is valid, and void where gift void, there being no difference between them except as to the dropping of the power of revocation in the case of the *iwaz*, while it is established in that of the gift. And after possession has been taken of the *iwaz*, the power to revoke drops also with respect to the gift. So that neither party can reclaim from his fellow what he has become possessed of, whether the *iwaz* were given by the donee or by a stranger, with or without his direction. All the conditions of gift are applicable to the *iwaz*; and the transaction does not come within the meaning of a contract of *mooawusut*, or mutual exchange, either in its inception or completion.”—(Baillie’s Digest, p. 543).

Now, such being the rule of the Muhammadan Law, the transaction of the 4th May, 1883, cannot be regarded as a *hiba-bil-iwaz*, or a gift for an exchange, unless it can be shown that the consideration for which that transaction took place was a previous gift passing from the plaintiff, the donee of the deed of the 4th May, 1883, to Fateh Ali, the donor. In other words, does the consideration mentioned in the deed of the 4th May, 1883, represent any gift made by the plaintiff to Fateh Ali on a former occasion? The answer to this question must be in the negative, because all the deed mentions as the consideration of the gift is “natural love and affection,” which induced the plaintiff, donee, to render services to the donor, to maintain him and treat him “with kindness and indulgence,” and to show him “all sorts of favours.” This being so, the next step in the reasoning is whether such natural love and affection, services and favours, could be made the subject of gift by the plaintiff to Fateh Ali, the donor of the deed of the 4th May, 1883.

The law upon the subject is perfectly clear, for the very nature of gift under the Muhammadan Law requires that the subject thereof must be a right of property in something specific without an exchange.—(Baillie’s Digest, p. 515). The Hedaya defines gift in the same sense:—“*Hiba* in its literal sense, signifies the donation of a thing from which the donee may derive a benefit: in the language of the law, it means a transfer of property, made immedi-

ately, and without any exchange.”—(Hamilton’s Hedaya, Vol. III, p. 678, Grady’s Ed., p. 482). It is therefore impossible to hold that the natural affection, kindness, services and favours mentioned in the deed of the 4th May, 1883, can be regarded as a *hiba-bil-iwaz*, or a gift for an exchange, as understood in the Muhammadan Law.

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There is, however, another aspect of this point to which I should like to refer, because it may have led to misapprehension of the Muhammadan Law by the learned Subordinate Judge. The term *hiba-bil-iwaz* is often misused by the Indian Muhammadans in respect of transactions which either amount to exchange or sale. Mr. Baillie has explained the matter at page 122 of his Digest in the following terms :—

“*Hiba-bil-iwaz* means, literally, gift for an exchange; and it is of two kinds, according as the *iwaz*, or exchange, is, or is not, stipulated for at the time of the gift. In both kinds there are two distinct acts; first the original gift, and second, the *iwaz*, or exchange. But in the *hiba-bil-iwaz* of India, there is only one act; the *iwaz*, or exchange, being involved in the contract of gift as its direct consideration. ‘And all are agreed that if a person should say, ‘I have given this to thee for so much,’ it would be a sale; for the definition of sale is an exchange of property for property, and the exchange may be effected by the word ‘give’ as well as by the word ‘sell.’ The transaction which goes by the name of *hiba-bil-iwaz* in India is, therefore, in reality not a proper *hiba-bil-iwaz* of either kind, but a sale; and has all the incidents of the latter contract. Accordingly, possession is not required to complete the transfer of it, though absolutely necessary in gift, and, what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it, though that cannot be done by either of the forms of the true *hiba-bil-iwaz*.”

Even in the light of this explanation, I cannot hold that the learned Subordinate Judge was right in holding that the transaction evidenced by the deed of the 4th May, 1883, was a *hiba-bil-iwaz* amounting to sale, there being no “exchange of property for property” in the sense of the Muhammadan Law of sale, nor “a

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transfer of ownership in exchange for a price paid or promised or part paid and part promised," within the meaning of s. 54 of the Transfer of Property Act (IV of 1882).

I have no doubt that the transaction evidenced by the deed of the 4th May, 1883, is nothing more or less than an ordinary gift under the Muhammadan Law, and that it is therefore subject to all the conditions as to validity which that law provides in respect of such gifts.

This leads me to the consideration of the second point in the case as enunciated by me, namely, whether the facts that at the time of executing the gift of the 4th May, 1883, the donor Fateh Ali was not in possession of the property which he purported to convey by gift, that he never acquired possession of such property during his life-time, and that the plaintiff, donee, has never acquired possession of property, are circumstances which render the gift invalid under the Muhammadan Law.

The answer to the question is not fraught with any difficulty, because the rule of the Muhammadan Law upon the subject is perfectly clear. Under that law delivery of possession to the donee is a condition precedent to the validity of a gift; for, to use the language of the Hedaya, "the prophet has said, 'A gift is not valid without seisin,' meaning that the right of property is not established in a gift until after seisin."—(Hamilton's Hedaya by Grady, p. 482.) "Tender and acceptance are necessary, because a gift is a contract, and tender and acceptance are requisite in the formation of all contracts, and seisin is necessary in order to establish a right of property in the gift, because a right of property, according to our doctors, is not established in the thing given merely by means of the contract without seisin."—(Hedaya, vol. iii, p. 291.) The same is the effect of the Fatwa Alamgiri as represented in Mr. Baillie's Digest:—"The legal effect of gift is not complete until possession is taken of the thing given, and, in this respect, a stranger and the child of the donor are on the same footing when the child is adult."—(Baillie's Digest, p. 520.) It has, indeed, never been doubted that under the Muhammadan Law of the Hanafi

school, which governs this case, actual delivery of possession of the gift of property is a condition precedent to the validity of the transfer of ownership to the donee, and, indeed, it is in consequence of the stringent requirements of that law on this point that gifts of property held in joint co-parcenership (*musha*) have been held to be invalid, because perfect and exclusive possession of joint undivided shares cannot be given to the donee—(*vide* Note No. 4 at p. 520, Baillie's Digest).

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Such then being the rules of the Muhammadan Law as to the indispensability of possession by the donee, it follows, *a fortiori*, that property of which the donor himself is not in possession, and never acquired possession thereof, so as to deliver it to the donee, cannot be made the subject of a valid gift. The exact effect of the rule in respect of property which by its very nature is not capable of actual possession being delivered to the donee need not be considered, because such question does not arise in this case. Here all the property consists of immoveable property, and the donor Fateh Ali could have taken possession of his alleged share upon the death of Shakurullah from whom he claimed to inherit that share. The property was susceptible of possession, but it was in the possession of a trespasser, according to the statement in the deed of the 4th May, 1883, itself, and the case now set up by the plaintiff under that deed.

To such a state of things the rule of Muhammadan Law provides no exception from the rule as to possession being a condition precedent to the validity of a gift. Under the precedents of gifts contained in Macnaughten's work on Muhammadan Law, Case No. 6 seems to me to be closely applicable to the present case. There a person had executed a deed of gift in favour of his nephew, conferring upon him the proprietary right to certain lands of which the donor was not in possession, but to recover which he had brought an action, during the pendency of which the donor died, and the donee claimed the litigated property under the gift. It was there held that "the gift of a thing not in the possession of the donor during his lifetime is null and void, and the deed

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containing such gift is of no effect, because, in cases of gift, seisin is a condition. Gift is rendered valid by tender, acceptance and seisin; but in gift seisin is necessary and absolutely indispensable to the establishment of proprietary right. According to the Hedaya,—‘Gifts are rendered valid by tender, acceptance and seisin. The prophet has said, a gift is not valid without seisin. So also if the thing given be pawned to or usurped by a stranger.’ So also in the *Shurhi Viqaya*,—‘A gift is perfected by complete seisin.’ As the gift is, therefore, null, the claim of the donee is inadmissible, and the deed is invalid, as far as regards the lands of which the donor was never possessed.”

Relying upon this precedent, Melvill and Pinhey, JJ., from whom Kembhall, J., dissented, held that even in a case where the donor, being the owner of the property subject to the possession of a mortgagee, made a gift of his right of ownership, such gift was invalid under the Muhammadan Law for want of actual possession of the property by the donor at the time of the gift. The case is *Mohinuddin v. Manchershah* (1), and I may respectfully say that it probably carries the rule as to seisin too far, as is suggested by a Muhammadan lawyer, Mr. Syed Amir Ali, of the Calcutta Bar, at page 70 of his Tagore Law Lectures for 1884. The question arising out of the rule of Muhammadan Law as to possession being a condition precedent to the validity of a gift was fully argued and well considered by Garth, C.J., in *Mullick Abdool Guffoor v. Muleka* (2), who in delivering his judgment has made observations in which I concur, for they draw a clear distinction between cases where from the nature of the gifted property itself actual possession could not be given to the donee, and cases where such possession might be given to the donee or actual possession held by the donor. The principle upon which the judgment of Sir Richard Garth in the Calcutta case proceeded is scarcely consistent with the *ratio decidendi* of the Bombay ruling above cited, but it is in accord with the principle of Sir Barnes Peacock’s judgment in *Shahazadee Hazara Begum v. Khaja Hossein Ali Khan* (3) which, though a case of

(1) I. L. R., 6 Bom., 650.

(2) I. L. R., 10 Calc., 1112.

(3) 12 W. R., 498.

endowment, would, so far as the question of seisin is concerned, be governed by the same principles as questions of gift under the Muhammadan Law on that point.

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It is not necessary for the purposes of this case to discuss these rulings more minutely, and it is enough to say that their general principle is that, for the validity of a gift under the Muhammadan Law, possession of the gifted property by the donor at the time of the gift, or at least at some time, so as to enable him to deliver possession of the same to the donee, and the actual delivery of such possession to the donee, are conditions precedent to the validity of gifts such as the gift evidenced by the deed executed by Fateh Ali in favour of the plaintiff on the 4th May, 1883.

The terms of that deed, however, clearly show, and it is proved and practically admitted on all hands, that in the first place no such possession ever existed in the donor Fateh Ali of the property which he intended to convey by the deed as would enable him to make a valid gift of the property; and in the next place it is equally clear, and indeed admitted, as shown by the very form of this suit, that the plaintiff donee never acquired possession of the property to which the suit relates and which he claims under the gift of the 4th May, 1883.

The matter therefore comes simply to this, that the deceased Fateh Ali, feeling himself entitled to a share of inheritance in the estate of the deceased Shakurullah, never having acquired possession of that share, executed the deed of 4th May, 1883, purporting to convey to the plaintiff such chances of success as the aforesaid Fateh Ali may have had in a litigation such as this, and as a matter of fact, the plaintiff never obtained possession of the gifted share in pursuance of the deed of gift.

Under these conditions I am satisfied that the lower Court misapprehended the Muhammadan Law as to such gifts, and that the gift of the 4th May, 1883, was invalid owing to the absence of possession in the donor and the absence of the delivery of possession to the donee.



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The lower Court has, however, relied on two rulings of this Court, one being, *Kasim Hossein v. Sharifunnissa* (1), and the other *Sahib unnissa Bibi v. Hafiza Bibi* (2), in support of its view. So far as these rulings are concerned, I need only say that the first of these, which was a judgment of my brother Straight and Mr. Justice Oldfield, only gave effect to the ruling of the Lords of the Privy Council cited in that judgment, and which was repeated by their Lordships in *Ameeroonissa Khatoon v. Abadoonissa Khatoon* (3) to the effect that the rule of Muhammadan Law, that a gift of *musha* or an undivided part in property capable of partition is invalid, does not apply to definite shares of zemindaris, which are in their nature separate estates with separate and defined rents; and that the second ruling, in which the judgment of the Court was delivered by Edge, C. J., related to a class of property of which the nature regulated by the statute is vastly different from the nature of the property involved in this litigation. Again, so far as the lower Court has relied upon the Bombay ruling in *Shaik Ibham v. Shaik Suleman* (4), it is enough to say that in that case possession such as the nature of the property admitted of was given to the donee, and in the case of the house the property was already in possession of the donee. All these cases are distinguishable from the present, because here the donor Fateh Ali was in no sort of possession of the share which he alleged himself to have inherited from Shakurullah, that the property was capable of being taken possession of by the aforesaid Fateh Ali, that he never obtained such possession either before or after the gift of the 4th May, 1883, and that the plaintiff donee himself never acquired such possession under the gift.

Under these circumstances I hold that the deed of gift, dated the 4th May, 1883, was invalid under the Muhammadan Law, that it therefore did not confer upon the plaintiff any such right as would entitle him to maintain an action such as this, and for these reasons I would decree this appeal, and reversing the

(1) I. L. R., 5 All. 285.

(2) I. L. R., 9 All. 213.

(3) L. R., 2 Ind. Ap. 87.

(4), I. L. R., 9 Bom., 146.

decree of the lower Court, dismiss the suit with costs in both the Courts. 1888

STRAIGHT, J.—I am entirely of the same mind.

*Appeal allowed.*

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July 12.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

KIAM-UD-DIN AND ANOTHER (PLAINTIFFS) v. RAJJO AND ANOTHER (DEFENDANTS).\*

*Account stated—Hypothecation-bond for the amount due—Obligor preventing registration of bond by denying execution—Suit on account stated—Civil Procedure Code, s. 586—Small Cause Court suit.*

For the purpose of determining whether a second appeal lies or is prohibited by s. 586 of the Civil Procedure Code, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance.

The plaintiff sued (i) for registration of a hypothecation-bond executed by the defendant, (ii) in the alternative for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation, and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts.

*Held* that under the circumstances of the case the plaintiff was entitled to resort to the account stated and sue thereon. *Sirdar Kuar v. Chandrawati* (1) distinguished.

Where two parties enter into a contract of which registration is necessary, it is essential that each should do for the other all that is requisite towards such registration.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Hamidullah*, for the appellants.

Munshi *Madho Prasad*, for the respondents.

STRAIGHT, J.—This was a suit brought by the plaintiffs for two reliefs; the first was for the registration of a bond, purporting to be a hypothecation bond executed by Musammat Rajjo Bibi, defendant, for the sum of Rs. 247-8-6; the second relief asked was,

\* Second Appeal, No. 504 of 1887, from a decree of Munshi Monmohan Lal, Subordinate Judge of Azamgarh, dated the 17th December, 1886, confirming a decree of Maulvi Muhammad Amin-ud-din, Munsif of Muhammadabad, dated the 27th August, 1886.

(1) I. L. R., 4 All., 330.

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in the event of the registration of that document being refused, for the recovery of that amount of money upon an account stated. The first Court dismissed the plaintiff's claim upon the ground that, as to the registration, the suit was barred by limitation ; and upon the authority of the case of *Sirdar Kuar v. Chandrawati* (1) further held that the plaintiffs could not recover upon the account stated, because there had been a novation of contract by the execution of the bond with a fresh promise to pay ; and the plaintiff not being able to produce the bond or to maintain a suit upon it by reason of its being unregistered, and the registration having been refused, the claim upon the account stated failed.

The plaintiffs appealed to the Subordinate Judge solely in regard to the view expressed by the first Court upon this latter point ; and the Subordinate Judge in regard to it adopted a similar view to that expressed by the Munsif.

From that decision of the Subordinate Judge the second appeal before us is preferred to this Court, and a preliminary objection is taken by Mr. *Madho Prasad* on the part of the respondent, that the suit being in the nature of a Small Cause Court suit, no second appeal lay from the decision of the Subordinate Judge. I overrule that contention of Mr. *Madho Prasad*. In my opinion, for the purpose of determining whether a second appeal lies or is prohibited by s. 586, what must be looked at is not the shape in which the case comes up in appeal to this Court, but the shape in which the suit was originally instituted in the Court of first instance.

It was then contended on behalf of the appellants that the decision of the Subordinate Judge affirming that of the Munsif is wrong ; and I am clearly of opinion that this is so. The ruling relied on by him is wholly inapplicable to this case, and both the lower Courts have proceeded upon a misapprehension of the scope and meaning of that ruling. In that case it was admitted on both sides that there was a bond hypothecating immoveable property as collateral security for the account stated. Therefore, there was a clear and specific contract admitted between the parties which superseded altogether

(1) I. L. R., 4 All., 330.

any contract or obligation that might be assumed from the mere statement of accounts between them. But in the present case the fact is wholly different ; because here the defendant denied not only the execution of the bond, but that there had been any dealings between herself and the plaintiff or that any account had been stated. As I pointed out in the course of the argument, if such a contention as that which is now put forward upon the other side in support of the judgments of the lower Courts were to be allowed, these plaintiffs would be absolutely without remedy, because assuming there to have been a contract, then the plaintiffs would have been defeated by the action of the defendant in denying the execution of the bond and so preventing registration, and if there was an account stated, then the plaintiffs could not sue upon it, because the existence of the bond would prevent them from doing so. But we cannot allow the defendant to take advantage of her own fraudulent conduct in preventing registration of the bond and to say that in that bond was represented the contract which superseded that which is to be inferred from the statement of accounts. In my opinion where two parties enter into a contract of which it is an essential incident that, in order to give legal effect to that contract and to enable the one party to enforce it against the other, the registration of the instrument embodying such contract is necessary, it is essential that each should do for the other all that is necessary towards securing the registration of the instrument which the law requires. Therefore I am of opinion that the plaintiffs are entitled to resort to their second relief and to bring their claim against the defendants upon the account stated. That being so, this appeal is decreed, the decision of the lower appellate Court being reversed the case will be returned to that Court for restoration to the file of pending appeals and disposal according to law. In dealing with the appeal it will be for the Subordinate Judge to determine whether there is evidence sufficient upon the record to enable him to deal with the question between the plaintiffs and the defendants with regard to the account stated. If there is evidence, he must deal with the case himself; if there is no evidence, or if there is no sufficient

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1888 evidence, then he must pursue the procedure laid down for his  
 KIAM-UD-DIN guidance in the Civil Procedure Code. Costs of this appeal will  
 v. be costs in the cause.  
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BRODHURST, J.—I concur.

*Cause remanded.*

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 July 24.

## FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.*

KULWANTA (DECREE-HOLDER), v. MAHABIR PRASAD AND ANOTHER  
 (JUDGMENT-DEBTOR).

*Stamp—Court-fee—Security-bond for costs of appeal—Act I of 1879 (Stamp Act), sch. i, No. 13—Act VII of 1870 (Court-fees Act), sch. ii, No. 6.*

*Held* by the Full Bench that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties—(a) an *ad valorem* stamp under the Stamp Act, art. 13, sch. i, (b) a court-fee of eight annas under the Court-fees Act, art. 6, sch. ii.

IN this case, Straight, J., made the following reference to a Division Bench :—

“ This is a question of stamp reported to the Court by the Registrar under the following circumstances :—Musammatt Kulwanta, the appellant in this Court, was required by an order to find security for the costs of the respondent in the event of her appeal failing, and, in pursuance of that order, she has filed two security-bonds, one for Rs. 433-5-4, and the other for Rs. 866-10-8, and they are severally stamped with the court-fee stamp of eight annas. The Registrar’s attention being called to the instrument, and the stamps affixed upon them, has reported the matter to the Court in terms of his order of the 8th of the present month, and the matter has come before me for disposal. The Registrar has referred to an opinion expressed by this Court in the year 1881, which was given by four of the then Judges of the Court, expressing certain views with regard to art. 13, sch. ii. of the Stamp Act, and to art. 6 of the second schedule of the Court-fees Act. In that opinion it would appear that a view expressed by Jackson, J., in *Soonjharce Koonwur v. Ramessur Pandey* (1) was adopted; and

(1) 5 W. R. Misc., 47.

the Registrar from that opinion and the ruling to which it refers suggests that the security-bonds in this case should have been stamped with a stamp under art. 13 of the Stamp Act of 1879. Mr. *Ram Prasad* for the appellant, contends that his client has sufficiently stamped the two security-bonds. He observes, and I think justly, that the opinion of this Court mentioned by the Registrar in his report was an opinion that was expressed extra-judicially, in the sense that it was without argument being heard. Upon comparing art. 6 of sch. ii of the Court-fees Act with art. 13 of the Stamp Act, I think there is considerable force in Mr. *Ram Prasad's* argument that the wide scope which has now been given to art. 6 of the Court-fees Act, in comparison with its terms in the older Court-fees Act, suggests that the instruments in this case are instruments of obligation given by the direction of the Court, and not otherwise specifically provided for. As, however, this view is in conflict with what I committed myself to in the former opinion, and as the holding it, if it be a right one, involves the necessity of overriding not only that opinion but the opinions of three other learned Judges, I think my proper course would be to refer the question here involved for disposal to a Division Bench. I direct accordingly."

The question was subsequently referred to the Full Bench.

Munshi *Ram Prasad*, for the appellant.

The following judgment was delivered by the Full Bench :—

EDGE, C.J., and STRAIGHT and TYRRELL, J.J.—We are of opinion that when a bond is given under the order of a Court as security by one party for the costs of another, it is subject to two duties, (a) one under the Stamp Act, art. 13, sch. i, according to its amount, (b) under the Court-fees Act, art. 6, sch. ii, and is liable to an *ad valorem* stamp and to a court-fee of eight annas. The analogy of an administration-bond is useful as a guide, because such an instrument is necessarily required by every Court granting letters of administration, and must be stamped under the Stamp Act and also under the Court-fees Act. This is our answer to the reference.

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July 26.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.*

RAGHUBAR DIAL AND OTHERS (DEFENDANTS), v. KESHO RAMANUJ DAS (PLAINTIFF).

*Trust—Trust for “public religious purposes”—Private trust—Suit by worshipper at Hindu temple relating to trust—Right to sue—Civil Procedure Code. ss. 30, 539—Act XX of 1863—Hindu Law.*

The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the revenue authorities mutation of names in the idol's favour, and an acknowledgment of the person whom they nominated as agent or manager. The plaintiff, alleging that they had subsequently repossessed themselves of the land and the profits accruing therefrom, and that he was interested as a Hindu in worshipping at the temple, and professing to sue on behalf of the entire body of the worshippers thereat, sued for a declaration that the land was *wakf*, and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple, and that the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of income. No sanction to the institution of the suit was obtained under s. 539 of the Civil Procedure Code.

*Held* by the Full Bench that the gift made by the defendants constituted a trust for the purposes of the temple.

*Per* EDGE, C. J., and TYRELL, J., that the defendants before the Court did not constitute themselves trustees in any sense.

*Held* also by the Full Bench that the suit was not maintainable as against those defendants.

*Per* STRAIGHT, J., that the suit was not maintainable under the Hindu Law; that the trust was one for public religious purposes; that such a suit, in which the plaintiff asked to have the trust administered by the Court, could not be maintained without the sanction required by s. 539 of the Code; that assuming s. 539 to be inapplicable, and Act XX of 1863 to apply, the suit could not be maintained without the sanction required by that Act; and that, with reference to s. 30 of the Code, no cause of action had accrued to the plaintiff alone on which he could maintain the suit.

*Per* EDGE, C. J., and TYRELL, J., that if the trust were one for public religious purposes, the suit as against the defendants before the Court must fail for non-compliance with the provisions of s. 539 of the Code, and if for private or *quasi-private* religious purposes, it must also fail, since there was no principle on which the plaintiff, as one of the public worshipping in the temple, could maintain it against those defendants who were not trustees but (if they had wrongfully taken possession) trespassers; that Act XX of 1863 could not apply; and that with reference to s. 30 of the Code, the plaintiff could not maintain the suit alone on his own behalf, or on behalf of himself and others against those defendants.

*Jawahra v. Akbar Hussain* (1) distinguished. *Manohar Ganesh Tambekar v. Lakhmiram Govind Ram* (2), *Lutifunissa Bibi v. Nasirun Bibi* (3), and *Hira Lal v. Bhairon* (4), referred to. *Wajid Ali Shah v. Dianat-ullah Beg* (5) approved.

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THIS was a reference to the Full Bench by Brodhurst and Mahmood, JJ., the question referred being whether the suit was maintainable under Hindu Law by the plaintiff-respondent, and with reference to ss. 30 and 539 of the Civil Procedure Code. The nature of the suit is stated in the judgment of the Full Bench.

Pandit *Sundar Lal* and Pandit *Ratan Chand*, for the appellants.

Mr. *C. Dillon*, Mr. *Dwarka Nath Banerji*, and Babu *Jogindro Nath Chaudhri*, for the respondent.

STRAIGHT, J.—The reference which is now before this Bench arose out of a suit in which one Kesho Ramanuj Das was the plaintiff, and four persons, Behari Lal, Musammat Kunder Kuar, Raghubar Dial, and Mohan Lal were the defendants. The question which is put to us in the order of reference is this:—"Was the suit maintainable under the Hindu Law by the plaintiff-respondent, and with reference to ss. 30 and 539 of the Civil Procedure Code."

It seems to me, for the purposes of determining this question, that it is material to look at the terms of the plaint upon which the plaintiff came into Court, and summarised they come to this. That Tika Ram was the absolute proprietor of 5 biswas of land situate in the Bareilly District; that he made a gift of those 5 biswas of land in favour of the four defendants, the female defendant being his daughter, Behari Lal being her husband, and the other two defendants being her sons; that Tika Ram died in or about 1867 leaving behind Musammat Pran Kuar his widow; that Musammat Pran Kuar, subsequent to the death of her husband, constructed a temple in honour of the god Janki Ballabhji, and dedicated it to that deity. The fifth paragraph of the plaint, which I had better state in terms, goes on to say:—"The defendants, in order to defray the expenses of the temple, made a gift of the said property

(1) I. L. R., 7 All. 178.

(3) I. L. R., 11 Calc. 32.

(2) I. L. R., 12 Bom. 247.

(4) I. L. R., 5 All. 602.

(5) I. L. R., 8 All. 31.



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in favour of Janki Ballabh, and voluntarily made an application for mutation of names, which was allowed, and Behari Lal, defendant, was appointed a manager of the temple." The plaint then goes on to say that "in 1875, the Tahsildar, of his own accord, made a report to the effect that the deity had no existence and could not be deemed to be in possession, and that as the donors were in actual possession, their names should be recorded. This was allowed by the Board of Revenue, and the names of the defendants were recorded, although the income of the property used to be spent in defraying the temple expenses.

"7. That since November, 1884, the donors have changed their mind and have stopped the payment of the expenses.

"8. The temple is a place of public worship, and residents of neighbouring places visit the temple. The plaintiff has been a *pujari* (worshipper) for the last seven years, and resides in it. He, therefore, on behalf of the entire Hindu community who worship in the temple, prays as follows:—

"(1) That it may be declared that 5 biswas, &c., is *wakf*;

"(2) That it may be declared and established that Thakur Ballabhji, in whose favour the gift was actually made, is entitled to hold the property in his name, as is customary with reference to temples;

"(3) That the defendants be directed to pay the income of the said property for defraying the expenses of the temple as hitherto;

"(4) That the Court may issue such orders and instructions as may be necessary and proper for the future management of, and as to the payment of the income for, the said temple."

I may as well at once say, in order to clear that consideration out of the way, that, as far as I am aware, there is no rule of Hindu Law, substantive or otherwise, that deals with or governs a claim of this description. I am not aware that there is any principle of Hindu Law which either sanctions or prohibits such a suit, nor is any suggested on either side. Therefore I reply in the negative as to the first question referred to us.

Then arise the following three considerations. First, looking to the frame of the plaint, is the suit one that comes within the purview of s. 539, Civil Procedure Code? If it is such a suit, then it is conceded on the part of the plaintiff that it is prohibited by that section, and could not be maintained without the sanction of the Collector as provided in the last paragraph of that section. If it is not prohibited by that section, then is it within the provisions of Act XX of 1863? And, lastly, assuming it not to be governed by either s. 539, Civil Procedure Code, or the provisions of Act XX of 1863, are the provision of s. 30, Civil Procedure Code, applicable to it?

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The terms of the plaint are unmistakeable, and there can be no question as to what the plaintiff alleges. He says that in the year 1870, the four defendants between them by an endowment created a trust in respect of this temple of Janki Ballabhji and of the idol contained therein, which endowment consisted of 5 biswas of land, the income of which was to be devoted to the expenses of the temple. I think I may so far look into the evidence in the case as to refer to the mutation proceedings of the 5th August, 1870; because that is specifically referred to by the plaintiff in his plaint; and may be reasonably taken to be incorporated into it. It appears to me, reading the terms of that petition, that it is good evidence that the four defendants made an out and out gift of the 5 biswas of land in favour of the Thakurji; that they had created an endowment in respect of that particular land in favour of that idol; and that whether Behari alone be regarded as the trustee of that endowment, or whether they and Behari be regarded as joint trustees, there was a trust in favour of the idol, who was the beneficiary so to speak under such trust.

Referring to page 371 of Mr. Agnew's book upon Trusts in British India, I may quote a passage from it, as it rests upon the authority of case law. He says :—"As an idol cannot itself hold lands, the practice is to vest the lands in a trustee for the religious purpose, or to impose upon the holder of the lands a trust to defray the expense of worship. Sometimes the donor is himself the

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trustee. Such a trust is of course valid, if perfectly created, though being voluntary, the donor cannot be compelled to carry it out if he has left it imperfect. But the effect of the transaction will differ materially according as the property is absolutely given for the religious object or merely burthened with a trust for its support. And there will be a further difference where the trust is only an apparent and not a real one, and where it creates no rights in any one, except the holder of the fund."

This is quoted from Mr. Mayne's Hindu Law, para. 362, and, I believe, represents the rules bearing upon the subject, which are also very fully stated in the recent ruling of the Bombay High Court in *Manohar Ganesh Tamberar v. Lakhmiram Govind Ram*.

(1) It appears to me, as I said before, that the terms of that petition are an indication of an absolute gift to an endowment in favour of the Thakurji of the 5 biswas of land which belonged to the owners. That being so, it seems to me that one can only regard that, the temple being an open temple, as a public religious purpose. If that be so, we have then the main element that is required for the purpose of bringing into operation the provisions of s. 539, Civil Procedure Code.

Now, then, what does s. 539 provide? It says :—" In case of any alleged breach of any express or constructive trust created for public charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, &c."

Now, it is not necessary, if I read that section aright, that there should have been any breach of trust; but it is sufficient if there be a public religious trust, and the direction of the Court is considered necessary for the administration of such trust. This view has been adopted by the learned Judges of the Calcutta High Court in *Lutifunnissa Bibi v. Nazirun Bibi* (2). Therefore this may be fairly regarded as a suit, to put it in its narrowest form, in which the plaintiff asks to have the trust administered by the Court. That being so, it seems to me that the sanction

(1) I. L. R., 12 Bom., 247.

(2) I. L. R., 11 Cal., 83.

of the Collector or such officer as the Local Government might appoint was necessary for the purpose of empowering the plaintiff to bring such a suit. In the referring order the Full Bench ruling in *Jawahra v. Akbar Husain* (1) is referred to, and apparently treated by the learned Judges who referred this case as in their opinion applicable to the particular circumstances of this case. In my opinion, it is not applicable. In that case the plaintiff brought his suit as a worshipper for the purpose of removing the interference of the defendants who had altered the structure of the mosque and had turned it into a place for storing straw. My brother Mahmood in that case was perfectly justified in observing that there was no suggestion in the plaint of a misapplication or a breach of trust, or a prayer for the administration of the trust, such as would bring the case under s. 539 of the Code. I, therefore, speaking for myself, do not think the Full Bench ruling above referred to governs this case. That being so, I think that s. 539 was applicable.

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If it was not, then does the case fall within Act XX of 1863? It is a pity, I think, that the learned pleader on behalf of the appellants could not have conceded that it did not. But if it does fall within that Act, then undoubtedly that Act required sanction to be given, which sanction has not been given, and therefore it would be prohibited and could not be maintained without sanction.

As to whether s. 30, Civil Procedure Code, is applicable, assuming that I am wrong as regards the view I have taken with regard to s. 539, I am at a loss to see what cause of action could have accrued to the plaintiff alone. It is impossible to understand upon what right the plaintiff can claim to maintain a suit such as the present against the defendants. As most material to this particular question and as supporting the view that I am now expressing, I may refer to the ruling of our late Chief Justice, Sir Comer Petheram, and Oldfield, J., in *Wajid Ali Shah v. Dianatullah Beg* (2). I think, therefore, I have now dealt with the matters that

(1) I. L. R., 7 All., 178.

(2) I. L. R., 8 All., 31.

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seem to me necessary for answering this reference. My answer to it is as given above.

EDGE, C.J.—In this case four persons, defendants in this suit, in 1870 made a gift of 5 biswas of land to a Hindu temple for the purpose of *bhog* and *arti* and other expenses appertaining to the idol. They appointed the defendant Behari Lall the manager and agent, and they presented a petition to the revenue authorities to have their names expunged and the name of the deity inserted instead and to have Behari recognised as the agent or manager. The plaintiff in his plaint alleges that he as a Hindu is interested in worshipping in this temple. He alleges also that the defendants have appropriated the income of the 5 biswas to their own purposes. He has brought this suit claiming the reliefs mentioned in my brother Straight's judgment. The Subordinate Judge who tried the suit decreed the claim against Behari and Bhugat *alias* Mohan. The latter had confessed judgment. Behari did not appeal, neither did Bhagwat, and as to whether the suit was maintainable as far as concerned them is consequently not a matter which we have now to consider. The plaintiff appealed from the decree of the Subordinate Judge, so far as the other two defendants were concerned, and on appeal the suit was decreed against them. They have now appealed to this Court; and out of that appeal has arisen this reference. We must, in my opinion, interpret this reference as applying only to the parties who can be affected by the appeal in this Court, that is, the defendants other than Bhagwat and Behari.

The first question to consider is as to whether a trust had been in fact created. It appears to me that the four defendants, short of executing a deed of declaration of trust, did everything else in their power to create a trust. They purported to give the 5 biswas to the god; they successfully applied to the revenue authorities for mutation of names in favour of the god, and for acknowledgment of the person whom they nominated as the manager or agent. One thing appears to me to be quite clear, that the defendants other than Behari, who was the manager, and whose case is not now before us, did not constitute themselves trustees in any sense. In

fact, as far as I can see, they divested themselves of their separate interest in these 5 biswas. That I think has some bearing upon the answer we should give to this reference. I may mention incidentally that of the two defendants now before us, one was found and the other was alleged to be a minor in 1870.

On behalf of the plaintiff, it was said that this was not a case coming within s. 539 of the Code, it being contended by Mr. *Banerji* that there was no express or constructive trust here for public religious purposes. He contends, of course, that there was a trust, but denies that the endowment of this small temple could be considered to be an endowment for public religious purposes. If this was an express or constructive trust for a public religious purpose, there is sufficient in the plaint itself to show that the case would come within s. 539, Civil Procedure Code, because in effect the plaint alleges that there has been a breach of such trust, that is, that Behari, who was appointed a manager, and who was also a donor, and the other defendants, who were donors, have, contrary to the objects of the trust, and the objects of the endowment, repossessed themselves of the 5 biswas and the profits accruing from them. It is quite true that in terms none of the reliefs claimed in this plaint are precisely the reliefs mentioned in clauses *a*, *b*, *c*, *d*, and *e* of s. 539 of the Code. But they are all, in my judgment, comprised within the phrase "or granting such further or other relief as the nature of the case may require." Here, not only does the plaintiff's plaint, if it states the facts truly, show that there has been misapplication and non-administration of the trust funds and trust property, but he asks in terms to have it declared that the 5 biswas were trust property of the god; and he calls in aid the assistance of the Court to enforce the trust. Consequently, if the purpose for which the endowment was made was a public religious purpose, the suit must fail, the provisions of s. 539 of the Code not being complied with. On the other hand, if, as Mr. *Banerji* contends, the purpose was not a public religious purpose in the sense of s. 539, but a private trust, for a private religious purpose, I fail to see on what principle the

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plaintiff is entitled to bring this action. I confine myself to the case of the two persons now before us in this appeal. They are not trustees. As far back as 1870 they did appoint a manager and did divest themselves of the property. If they have since that date wrongfully taken possession of those 5 biswas and appropriated to their own purposes the income, that in my judgment does not constitute them trustees, but would make them trespassers dealing with the property to which they are not entitled. How in that case a person, who is really one of the public, although he can worship in the temple, can maintain an action against these persons as trespassers, I fail to see. I have seen no authority to show that such an action is maintainable.

I may say also that I also fail to see how Act XX of 1863 can apply in this case. The temple and trust, if there was one, came into existence in 1870 and was not in existence at the date of that Act.

There is another question raised, as to whether this action could be maintained by reason of s. 30 of the Civil Procedure Code? In my opinion neither the plaintiff, nor the body of Hindus who might worship in this temple, nor the body of Hindus generally, could maintain this action, if the trust were a private trust. The fact that the plaintiff apparently had notices issued to the Hindus interested could not, in that view, entitle him to maintain the action alone, on his own behalf, or on behalf of himself and others. If this trust was for a public religious purpose, s. 539, Civil Procedure Code, would still apply, whether the notices required by s. 30 of the Code had issued or not. I fully agree with my brother Straight that the ruling in the case of *Jawahra v. Akbar Husain* (1) referred to in the order of reference does not govern this case. That was a case in which a Muhammadan was suing the persons who, by their act of converting a mosque to purposes other than religious purposes, had prevented him exercising his undoubted right of using the mosque for purposes of prayer. The case which appears to me to be practically on all fours with this case is that

(1) I. L. R., 7 All., 178.

of *Wajid Ali Shah v. Dianatullah Beg* (1), and I must say, so far as the facts of that case are applicable here, I agree with the judgment of the late Chief Justice which was concurred in by Oldfield, J. 1888.

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The passage quoted by my brother Straight from para. 362 of Mayne's Hindu Law (3rd ed.) in my opinion correctly lays down the Hindu Law with regard to trusts in favour of idols. That passage is elaborated and other considerations are referred to in subsequent paragraphs.

To put it shortly, whether this trust was a public trust or a private one, whether the purpose was a public religious or private or quasi-private religious purpose, in my opinion this suit is not maintainable as against the appellants to this appeal. From what I have already said may be gathered the opinion that I might have as to whether the suit was maintainable at all: but I decline to express any opinion whether it was maintainable against those defendants who are not parties to this appeal. It is not quite clear, from the form of the reference, whether our opinion was asked as to the suit being maintainable against all the defendants, or merely those defendants who are parties to the appeal.

TYRRELL, J.—I entirely concur with the opinions expressed by the learned Chief Justice; and would add this only, that the true scope and purview of s. 30, Civil Procedure Code, has been laid down by three Judges of this Court in a case which was before four Judges of the Court,—*Hira Lal v. Bhairon* (2).

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

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July 27.

HARI TIWARI AND OTHERS (DEFENDANTS) v. RAGHUNATH TIWARI AND ANOTHER (PLAINTIFFS).

*Exchange—Agreement that if either party were deprived of land received he should receive other land—Suit for specific performance—Act XV of 1877 (Limitation Act), sch. ii, No. 113.*

In 1871 the plaintiffs and the defendants executed a deed whereby they effected an exchange of certain lands, and each party agreed to resist by legal process or by bringing

(1) I. L. R. 8 All., 61.

(2) I. L. R., 5 All. 602.



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an action any claim or interference with the other in respect of the property exchanged, and to bear the costs which might be incurred in such legal proceedings in certain proportions, and that if as a result of such proceedings either of the parties were deprived of the lands exchanged or any part of them, the other should make it up out of certain of his own land. In 1881 the plaintiffs brought an action against a third party who claimed title to some of the exchanged lands, and joined the defendants as defendants, the latter admitting the plaintiff's title. The plaintiffs were defeated in that suit in 1882. In 1885 (within three years from the time the defendants refused to give them other land), they sued on the deed of 1871 to have the exchange therein provided for carried out.

*Held* by the Full Bench that the cause of action arose in 1882, when there was a loss to the plaintiffs in the sense contemplated in the deed, and the defendants were called upon specifically to perform their covenant, and that the present suit having been brought within three years after their refusal to perform it, was within the time fixed by Art. 113, sch. ii of the Limitation Act (XV of 1877).

THE facts of this case were as follows:—By a deed dated the 14th April 1871, executed by the plaintiffs and defendants, who were “*gawandadars*” in the villages of Bishunpura and Baghauli, 12 biswas and 2 dhurs of land in Baghauli belonging to the plaintiffs were exchanged for the same quantity of land in Bishunpura belonging to the defendants. The deed contained the following agreement by the parties:—“It is to be observed that if any co-sharer of the village or zamindar of the mahal in either village, claims or interferes with the lands the subject of the exchange, we, all both parties, shall unite with one another to prevent him. The costs which may be incurred in consequence of such interference shall be paid by both parties in proportion to their shares, *viz.*, two shares by the first party (defendants) and one share by the second party (plaintiffs): and if there be any loss of land, the subject of exchange, we shall make it up and equalize the difference from the waste land owned by each party close to the *pucka* wells in the two villages.”

In 1881 the plaintiffs sued one Jadupat Tiwari, and certain other persons for possession of a portion of the land which they had received in exchange, alleging they had been dispossessed by those persons. They joined as defendants in that suit the persons from whom they had received the land, the defendants in the

present suit, who supported them in their claim. That suit was dismissed on the ground that the land belonged to Jadupat and others, and not to the transferors. The decision was affirmed by the High Court in July, 1882.

Upon this, in August, 1885, within three years from the time the defendants refused to give them other land, the plaintiffs brought the present suit against the defendants, claiming by virtue of the deed of exchange to recover land from the defendants in the place of the land of which they had been deprived. The lower appellate Court gave the plaintiff's decree, from which the defendants appealed.

The appeal, which raised the question whether the suit was barred by limitation or not, was eventually referred to and heard by the Full Bench.

Mr. *J. E. Howard*, for the appellants.

Munshi *Juala Prasad*, for the respondents.

EDGE, C.J.—This is a suit brought upon a deed of the 14th April, 1871. The suit must be regarded as a suit for specific performance of one of the covenants contained in that deed. By that deed the parties to this action exchanged certain lands, and they covenanted in somewhat loose language, but legally to the following effect:—that if any co-sharer or zamindar should claim or interfere with the lands the subject of exchange, the parties to the deed of exchange would unite with each other to resist such claim or interference; and that the costs to be incurred in consequence of any such interference should be borne by the parties to this deed, in the proportion of two-thirds and one-third. Then came the material words of the covenant. Those words as translated are as follows:—“And if there be any loss of the lands, the subject of exchange, we will make it up and equalize the difference from the waste land owned and possessed by each party close to the *pucka* wells in the two villages.”

I have no doubt that the true construction of that covenant, taking all those terms together, the terms that I have quoted, and

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the terms that I have referred to, is that each party agreed to resist by legal process or by bringing an action any claim or interference with the other in respect of the land exchanged, and to bear the costs which might be incurred in such legal proceedings in certain proportions, and that if as a result of those legal proceedings one of the parties was deprived of the lands exchanged, or any part of them, the other party should make it up out of his own land situate close to *pucka* wells.

The plaintiffs alleged that they were dispossessed in 1881 ; it is doubtful whether they ever were in possession at all. But I think that point is not material in this particular case. In 1881 the plaintiffs brought an action against Jadupat Tewari and others, who claimed title to some of the exchanged lands. In that action they joined the present defendants, who were the other parties to the deed of 1871, as defendants. They could not have joined them as plaintiffs. The present defendants acted up to their covenant, in this respect that they assisted the plaintiffs in that case by admitting their title as against Jadupat Tewari and the others. The result of that litigation was that in 1882, by a decree which was confirmed in this Court, Jadupat Tewari and his co-defendants who claimed title along with him in this land were held to be entitled to the land in question.

On that, and within three years, the plaintiffs brought their present claim on the deed of 1871, to have the exchange therein provided for carried out. The only question which we have got to decide is whether the plaintiffs' suit was brought within time. It was contended on behalf of the defendants that the cause of action arose in 1871, on the execution of the deed of exchange ; that contention being based upon the fact that at that time the now defendants had not got title to the lands which are now in suit. If we had merely to consider the case in which a defendant was sued for the breach of a covenant for title, no doubt the period of limitation would begin to run from the time when the deed was executed. But this is not a covenant for title ; this is a covenant to provide for what might happen in case of either of the parties to the deed

being dispossessed by adverse title; and until the event arose which was contemplated by the covenant, the cause of action of the present plaintiffs could not arise. Now that event did not arise according to our construction of the covenant until 1882, when there was a loss owing to the adverse decision of the litigation. After the decision in 1882, the defendants were called upon specifically to perform their covenant, and this action was then brought within three years of their refusal to perform it. It was therefore brought within the time fixed by art. 113, sch. ii, Limitation Act. The appeal must be dismissed with costs.

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STRAIGHT, J.—I am of the same opinion, and I concur with the learned Chief Justice that this suit was not barred by limitation.

MAHMOOD, J.—I agree with the learned Chief Justice.

*Appeal dismissed.*

## APPELLATE CIVIL.

1888  
August 11.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.*

GIRWAR SINGH AND ANOTHER (DEFENDANTS) v. SITA RAM (PLAINTIFFS).\*

*Jurisdiction—Remand—Act XII of 1881 (N.-W. P. Rent Act), s. 208.*

AN Assistant Collector dismissed a suit without considering the merits, on the ground that it was not cognizable by a Revenue Court. On appeal, the District Judge held that it was unnecessary to determine the question of jurisdiction as he had power in any event under s. 208 of the N.-W. P. Rent Act, to remand the suit to the Assistant Collector, and he remanded it accordingly.

*Held*, that the Judge had rightly construed s. 208 of the Rent Act, and that the remand was proper. *Ahmaduddin Khan v. Majlis Eai* (1) distinguished.

THIS was a suit under s. 93 (g) of the N.-W. P. Rent Act (XII of 1881) by a lambardar against certain co-sharers for arrears of Government revenue paid by him on account of their shares. The suit was dismissed by the Assistant Collector of Aligarh, without entering upon the merits, on the ground that, when it was

\* First Appeal, No. 95 of 1888, from an order of H. E. Evans, Esq., District Judge of Aligarh, dated the 27th March, 1888.

(1) I. L. R., 5 All., 438.

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instituted, the defendants were no longer co-sharers in the village, and that he had therefore no jurisdiction to entertain it. The plea as to jurisdiction was raised before the Assistant Collector by the defendants. The plaintiff appealed to the District Judge of Aligarh, who observed:—"Under s. 208 of the Rent Act, this Court has power to remand the suit to the Revenue Court, whether that Court was competent to entertain the suit or not. It therefore is superfluous to determine the question whether the Revenue Court was competent or not to hear the suit. In any case I am clearly of opinion that the issues raised are such as would be more appropriately decided by a Revenue Court. I therefore under s. 562 of the Code of Civil Procedure and s. 208 of the Rent Act remand the case to the Court of the Assistant Collector with directions to re-admit the suit and proceed to investigate and dispose of the suit on the merits."

The defendants appealed to the High Court from the order of remand.

Mr. *A. H. Reid*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C.J.—I think the District Judge of Aligarh is perfectly right in the construction he put on s. 208 of the Rent Act. Even if it was not strictly a Revenue Court suit, I do not think that the judgment of the Full Bench in the case of *Ahmaduddin Khan v. Majlis Rai* (1) shows that the District Judge had not power to remand the case to the Revenue Court. The question before the Court there was whether the District Judge, believing that the suit was brought in the wrong Court, was right in dismissing the suit altogether, or whether he ought not to have remanded it to the Court which he thought had jurisdiction. I infer from the judgment of my brothers Straight, Brodhurst and Tyrrell that that was all they meant to decide. I think the appeal should be dismissed with costs.

MAHMOOD, J.—I agree with the interpretation which the learned Chief Justice has placed upon s. 208 of the Rent Act, and agree—

(1) I. L. R., 5 All., 438.

ing with him I need say nothing further except that the order which he has passed is the only order which could be passed in the case.

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*Appeal dismissed.*

*Before Mr. Justice Straight and Mr. Justice Mahmood.*

INDAR KUAR (PLAINTIFF) v. GUR PRASAD AND ANOTHER (DEPENDANTS)\*

1888  
August 16.

*Civil Procedure Code, ss. 28, 45—Mis-joinder of causes of action.*

The judgment of the majority of the Full Bench in *Narsingh Das v. Mangal Dubey* (1), except in its general observations as to the provisions of the Civil Procedure Code relating to joinder of parties and causes of action, proceeded upon and had reference to the special circumstances of the case, and to the allegations made by the plaintiff in his plaint, and was not intended to be carried further.

In a suit for possession of immoveable property, part of which had been usufructually mortgaged by defendant No. 1 to defendant No. 2, the plaintiff alleged that the first defendant had no title to make such a mortgage, while both defendants maintained such title,

*Held*, that inasmuch as the title of defendant No. 2 was derived from defendant No. 1, and stood or fell with the failure or success of the plaintiff's claim against the latter, there were not two causes of action but one, namely, the infringement of the plaintiff's right by the defendant No. 1, and hence the suit was not bad for misjoinder of causes of action.

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Moti Lal Nehru* and Pandit *Bishambhar Nath*, for the appellants.

Munshi *Ram Prasad*, for the respondent.

STRAIGHT, J.—The plaint in this case is somewhat prolix, but stripped of superfluous details and allegations, it comes to this, that as to the defendant Gur Prasad, the plaintiff seeks to have her title declared to and to obtain possession of a 4 annas 8 pies share in mauza Lahra, and as to the defendant Bank, to eject it as a trespasser in possession from 2 annas 8 pies out of the 4 annas 8 pies of Sisai Sipah, which it professes to hold under a usufructuary mortgage executed in its favour by the defendant Gur Prasad, by

\* First Appeal, No. 85 of 1887, from a decree of Babu Promoda Charu Banerji, Subordinate Judge of Allahabad, dated the 22nd March, 1887.

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having it declared that he had no title to make such a mortgage, the share mortgaged, as well as the remaining share, being the property of the plaintiff by inheritance from his deceased mother Musammat Bijja. It is unnecessary to say more of the defendant Gur Prasad's defence to the suit than that he denies that any share in property belonging to the plaintiff is now in his possession, and as to the 2 annas 8 pies of Sisai Sipah, he says it was mortgaged by him to the defendant Bank with possession in order to raise funds to save the share from auction-sale for arrears of Government revenue. The defendant Bank reiterates this statement, and claims the right of a usufructuary mortgagee to hold possession of the share until the mortgage-debt has been discharged. It is clear therefore from this that any right the defendant Bank has, flows through and from the defendant Gur Prasad: in other words, that as to part of the plaintiff's claim, they have a united interest, in the sense that any title the Bank can make, must be made through him. The learned Subordinate Judge, who had the case before him, as the Court of first instance, has held the suit bad for misjoinder of causes of action for the reasons stated by him in his decision, relying more especially on a Full Bench ruling of this Court, *Narsingh Das v. Mangal Dubey* (1). As I am responsible for the terms of the judgment of the majority in that case, having written it, I think it right to say that, except in so far as the general observations in it as to the provisions of the Civil Procedure Code relating to joinder of parties and causes of action are concerned, it proceeded upon and had reference to the special facts and circumstances of the case itself and to the allegations made by the plaintiff in his plaint. I may also add that I know my brother Judges, who were parties to the ruling, took the same view, and had no intention that it should be carried further than the particular case in which it was made. In the present suit, as to the one head of claim in which the defendant Bank is interested, any title that it possesses flows through and is derived from the defendant Gur Prasad, and if he has usurped or appropriated rights

(1) I. L. R., 5 All., 168.

which belong to the plaintiff as to the village Sisai Sipah, such title stands or falls according as the plaintiff establishes or fails to establish her claim against him. There cannot therefore properly be said to be two causes of action: on the contrary, there is a single cause of action, namely, the infringement of the plaintiff's right by the defendant Gur Prasad, out of which has flowed the title asserted by the defendant Bank and denied by the plaintiff. For these reasons I think the learned Subordinate Judge was wrong in the view he took, and in applying the Full Bench ruling to the present case. I allow the appeal, and reversing his decree, direct him to restore the suit to his file of pending cases and to dispose of it according to law. Costs will be costs in the suit.

MAHMOOD, J.—I agree in all that has been said by my brother Straight in respect of this case; and as I was the only dissentient Judge in the Full Bench case of *Narsingh Das v. Mangal Dubey* (1), I wish to say that I am very glad to adopt the interpretation which my brother has put upon that ruling, and concur in the order which he has made.

*Cause remanded.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.*

CHEDA LAL AND ANOTHER (PLAINTIFFS) v. BADULLAH AND OTHERS  
DEFENDANTS.\*

1888  
May 23.

*Practice—Appeal on full court-fee from decree dismissing suit in part—Remand of whole case, though no cross-appeal or objections preferred—Dismissal of whole suit on remand—High Court competent in second appeal to consider validity of remand order not specifically appealed—Civil Procedure Code, ss. 544, 561, 562, 578.*

A plaintiff whose suit had been decreed in part appealed from so much of the first Court's decree as was adverse to him, and stamped his memorandum of appeal with a stamp which would have covered an appeal from the whole decree. The defendant did not appeal or file cross-objections. The lower appellate Court remanded the whole case to the first Court under s. 562 of the Civil Procedure Code, the plaintiff

\* Second Appeal No. 2086 of 1886 from a decree of Maulvi Zain-ul-abdin, Subordinate Judge of Moradabad, dated the 24th July, 1886, confirming a decree of Muhammad Ezid Bakhsh, Munsif of Moradabad, dated the 22nd December, 1884.

(1) I. L. R., 5 All., 163.



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not appealing under s. 588 (28) from the order of remand. The first Court now dismissed the whole suit, and, on appeal by the plaintiff, the lower appellate Court confirmed the decree. On a second appeal to the High Court—

*Held* (i) that the High Court was competent to consider the validity or propriety of the order of remand, though it had not been specifically appealed against; (ii) that the order of remand was *ultra vires*, so far as it related to that part of the first Court's decree which was favourable to the plaintiff, the lower appellate Court not having jurisdiction, in the absence of any appeal or objections by the defendant, to disturb that part of the decree; (iii) that the order of remand was not made valid by the subsequent appearance of the plaintiff before the first Court or by the appeal from the first Court's decree on the remand; and (iv) that the case was not covered by s. 578 of the Code.

*Per* MAHMOOD, J.—S. 544 had no application to the case, that section relating only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common to all, and not to cases where either of two opposite parties appealed from a part of the decree upon a court-fee sufficient for an appeal from the whole.

*Maharajah Moheshur Singh v. The Bengal Government* (1), *Forbes v. Amoor-eemissa Begum* (2), and *Shah Mukhna Lall v. Baboo Sree Kishen Singh* (3) referred to.

THIS case was referred to a Division Bench by Mahmood, J. The facts are sufficiently stated in the judgment of Edge, C.J.

Babu Katan Chand, for the appellants.

Munshi Madho Prasad and Mir Zahur Husain, for the respondents.

EDGE, C.J.—The plaintiffs brought their suit in the Munsif's Court of Moradabad. They claimed possession of land and to have a door which had been recently opened by the defendants closed. The Munsif decreed the plaintiffs' claim as to the land, and dismissed their suit as to the door. The plaintiffs appealed as to so much of that decree as dismissed their suit to the door. The defendants filed objections to so much of that decree as decreed the plaintiffs' claim to the land. The Subordinate Judge on that appeal and on those objections remanded the whole case under s. 562 of the Code of Civil Procedure. The Munsif on that remand again decreed the plaintiffs' claim as to the land and dismissed their claim as to the

(1) 7 Moo. I. A., 283.

(2) 10 Moo. I. A., 340.

(3) 12 Moo. I. A., 157.

door. The plaintiffs again appealed as to so much of the decree as dismissed their suit as to the door. The defendants did not appeal or file objections. The plaintiffs stamped their appeal with a stamp which would have covered an appeal against the whole decree. On that appeal the Subordinate Judge again remanded the whole case under s. 562. The Munsif heard the case again, and on this occasion dismissed the whole of the plaintiffs' suit. From that decree the plaintiffs appealed. On appeal the Subordinate Judge confirmed the decree of the Munsif and dismissed the appeal. From that decree of the Subordinate Judge this second appeal has been preferred. As to so much of this appeal as relates to the plaintiffs' claim to have the door closed, Mr. *Ratan Chand* for the appellants does not contend that we can interfere with the findings below, those findings being findings of fact, so we need not consider that portion of the case. Mr. *Ratan Chand* contends that the second order of remand, namely, (that of the 10th December, 1885, was *ultra vires* so far as that portion of the decree of the 25th September, 1885, which related to the plaintiffs' claim to the land was concerned, and that the only valid decree relating to the plaintiffs' claim to the land is the decree of the 25th September, 1885, which was not the subject of appeal, and as to which the defendants did not file objections. On the other hand, it is contended that we cannot in second appeal consider whether the order of remand of the 10th December, 1885, was good or bad, as it was not specifically appealed against as it might have been under s. 588 (28) of the Code of Civil Procedure, and that the plaintiffs by appealing from the last decree of the Munsif waived any right to object to the order of the 10th December, 1885, and further that this is a case within s. 578 of the Code of Civil Procedure.

As to our power in second appeal to consider the validity or propriety of the order of the 10th December, 1885, there can be no doubt. There are two or three decisions of the Privy Council which show that that is a power we can now exercise. Was the order of the 10th December, 1885, so far as it related to the land, *ultra vires* or not? The Subordinate Judge thought that because

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the plaintiffs had stamped their appeal with a stamp which would cover an appeal on the whole case, he might treat the appeal which, in truth, was only in respect of so much of the Munsif's Court's decree as dismissed the claim to close the door as if the plaintiffs were appealing against the whole decree. It is an extraordinary proposition that a Subordinate Judge is to look at the stamp on a memorandum of appeal and not at the memorandum itself in order to see which part of a decree is the subject of an appeal before him. The plaintiffs' claim as to the land having been decreed on the 25th September, 1885, they could not have appealed against that portion of the decree: it gave them what they asked. The Subordinate Judge could no more deal with a part of a decree which was not challenged by a memorandum of appeal or by objections filed by the opposite party than he could pass an order reversing the decree of a Munsif when that decree was not in appeal before him. The memorandum of appeal or objections when filed are what give the Judge on appeal jurisdiction to interfere with the decree below. He cannot of his own motion deal with a decree which is not the subject of appeal to him, or with a portion of a decree against which portion there has been no appeal and no objections filed.

In so far as he assumed to set aside the decree of the Munsif of the 25th September, 1885, which decreed the plaintiffs' claim as to the land, he acted without any jurisdiction whatever. The fact that the plaintiffs on that remand appeared before the Munsif could not give the Munsif jurisdiction to re-open the question as to the land. The appeal against the decree of the Munsif could not validate the portion of the order of remand of the 10th December, 1885, which was made without jurisdiction. The parties by appearing before a Court which has no jurisdiction cannot give that Court jurisdiction in the absence of legislative enactment. In my opinion nothing which had taken place did make or could make that portion of the order of the 10th December, 1885, which remanded the case as to the land valid. As to the contention that this is a case within s. 578 of the Code of Civil Procedure, the

answer to that is threefold. First of all, there is here more than an irregularity; it is an exercise of jurisdiction where there was none. Secondly, the act of the Subordinate Judge did affect the merits of the case in this way, that the plaintiffs rightly or wrongly having got a decree establishing their right to the land, and that portion of the decree not being before the Subordinate Judge on appeal, they had established their title so far as a Court of law could establish it for them. Thirdly, it is a question affecting the jurisdiction of the Court. In my opinion the Subordinate Judge had absolutely no jurisdiction to deal with that portion of the decree which was not the subject of the appeal before him. I am of opinion that this appeal should be dismissed with costs so far as it relates to the claim to close the door, and that it should be allowed with costs here and below so far as it relates to the claim to the land, and that so much of the Subordinate Judge's order of the 10th December, 1885, and of his last decree as relates to the plaintiffs' claim to the land must be reversed, and the decree of the Munsif of the 25th September, 1885, be restored.

MAHMOOD, J.—I agree in all that has fallen from the learned Chief Justice and in the order which he has made. This being a case referred by me for decision, I wish to add a few observations. I understand the case now as I did when I made my order of reference of the 28th July, 1887, and that order enunciated the three points on which the decision of the case depends. As to the first of these points I have to refer to s. 544 of the Code of Civil Procedure, which is the only section on which any reliance could be placed for the contention that when the plaintiff who has only partly succeeded had appealed from such portion of the decree as was against him upon the stamp valued in proportion to the whole amount of the claim in the appellate Court, he would be placed on a worse footing than that on which he stood before he had preferred an appeal. S. 544 of the Code of Civil Procedure applies in my opinion only to appeals by parties arrayed on the same side of a litigation in the original Court, and against whom judgment on a common ground has been passed and only some of them appeal from such judgment

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on behalf of themselves and others who do not join in the appeal. That section does not relate to cases in which a party (be he plaintiff or defendant in the original Court) who has been unsuccessful only to a certain extent of the subject-matter of the litigation in appeal from so much of the decree as has been passed against him happens to value the appeal as if it related to the whole subject-matter of the litigation, or to pay court-fees on such amount. No Court could take a matter such as the payment of the court-fees stamps as a test whereby its jurisdiction is to be decided. I hold, therefore, on the first point in the referring order that that question should be answered in the negative. As to the second question enunciated in my order of reference, I agree with the learned Chief Justice in holding that so much of the decree of the first Court as was not appealed from was not within the scope of the jurisdiction of the lower appellate Court, and that Court in making its order acted *ultra vires* or without jurisdiction, because no tribunal has any power to deal with the subject-matter of the litigation which is not brought before it as the subject for adjudication. On the third question as stated by me in the order referring the case, I have no doubt, for the reasons which have been stated, that the provisions of s. 578 of the Code do not cover the case even though in consequence of the remanding order of the 10th December, 1885, which was passed under s. 562 of the Code of Civil Procedure, a trial *de novo* has taken place in this case and a decree has been passed by the first Court dismissing the claim, and that decree has been confirmed by the lower appellate Court. The scope of that section cannot be so extensive as to bring within the scope of adjudication matters not subject to adjudication in the Court of first instance or in the Court of appeal, and therefore the interference by the lower appellate Court which it made by the order of the 10th December, 1885, was illegal, and, as such, fit for being interfered with by us even at this stage. It has been argued that because the lower appellate Court's order of the 10th December, 1885, might have been appealed from under s. 588 of the Code of Civil Procedure, and, inasmuch as such appeal was not preferred, in

is no longer open to us in second appeal to consider the validity of that order. Orders of remand such as s. 562 contemplates are necessarily orders of an interlocutory character because they do not definitely purport to dispose of the litigation with which they deal. Such orders may no doubt be appealed from, and the Court of appeal can adjudicate on them with such power as to finality as the appellate Court possesses. But when in a case such as this such order is not appealed from, and, having been carried out, adjudication in pursuance thereof has been made, I do not think that the circumstance of such order not being appealed from would preclude the parties from bringing up such questions when the final decree in the case has been made and is rendered the subject of an appeal. The learned Chief Justice has stated why this should be so on legal reasoning, and indeed, if any further reason were required, I should say that the rulings of their Lordships of the Privy Council in *Maharajah Moheshur Singh v. The Bengal Government* (1), *Forbes v. Ameeroonissa Begum* (2), and *Shah Mukhun Lal v. Baboo Sree Kishen Singh* (3) were authorities for this proposition. These rulings proceeded no doubt on earlier law, but I am not aware that the rule has been modified in the Civil Procedure Code by which this case is covered. The effect of this view is to agree with the decree of the learned Chief Justice.

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*Appeal allowed in part.*

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*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst and  
Mr. Justice Mahmood.*

KHUMAN SINGH AND OTHERS (DEFENDANTS) v. HARDAI (PLAINTIFF).

*Pre-emption—Wajib-ul-arz—Construction—"Karibi," meaning of.*

The word "*karibi*" used by itself in the pre-emptive clause of a *wajib-ul-arz* to indicate shareholders "near" to the vendor is ambiguous and inadequate to express the intentions of the shareholders.

- (1) 7 Moo. I.A., 283. (2) 10 Moo. I.A., 340.  
(3) 12 Moo. I.A., 157.

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The pre-emptive clause in the *wajib-ul-arz* of a village gave a right of pre-emption, in cases of sale by shareholders, first to "*bhai hakiki*" (own brothers), next to "*karibi*" (near), and next to co-sharers in the same *thoke* as the vendor.

*Held* that although the word "*karibi*" must be read in connection with the preceding word "*bhai*," the words "*bhai karibi*" could not reasonably be confined to cousins, but must be construed as meaning "*bhai band*" or "*bhai log*," so as to include all near relatives, both male and female.

*Held* also that a vendor's father's brother's widow, holding a share in the village absolutely and as heir of her deceased husband, was entitled to pre-emption in preference to the vendees, who were only sharers in the same *thoke* as the vendor.

This was a suit for pre-emption, based on the following clause in the *wajib-ul-arz* of a village :—

"A shareholder wishing to sell his share will sell it (*i.e.*, offer it for sale) at a fair price, first to a *bhai hakiki* (an own brother), after that to *karibi* (near), after that to a sharer in the *thoke* or in a second (or another) *thoke*."

The plaintiff was one Musammat Hardai, widow of one Jawahir Lal. The vendors (who did not contest the claim) were her nephews—sons of her husband's brother. The defendants-vendees were sharers in the village and in the same *thoke* as the plaintiff. Among other pleas they contended (i) that the plaintiff was not a sharer within the meaning of the *wajib-ul-arz*, as she was in possession of the share by virtue of which she claimed, by way of maintenance as a Hindu widow, and not by right of inheritance, (ii) that assuming her to be a sharer, she did not come within the category of "*karibi*," and so had no right preferential to their own.

The Court of first instance (Subordinate Judge of Meerut) dismissed the suit. The Court observed :—

"Now the question is whether the plaintiff in this case, who is the aunt of the vendors, that is, the vendors' father's brother's wife, comes within the word '*karibi*.' Reading the word '*karibi*' with the preceding words '*bhai hakiki*,' there remains no doubt that these words *hakiki* and *karibi* (real and near) are used in connection with the word *bhai* (brother), and that they both qualify the same word *bhai*. In fact, I see that no other construction can reasonably be

put to it. Whoever else may come under the words *bhai karibi*, I do not think that a female relative, such as the plaintiff, can be brought within those words. If the words *bhai hakiki* and *bhai karibi* be construed strictly, they would not include any but the brothers and cousins; by a broader construction, as the word *bhai* sometimes is used in vernacular common dialogue, it may mean and include some other male near relatives; but to include an aunt in the word *bhai* would certainly be going too far, and giving it a meaning which is never applied to it. I am of opinion that the second issue must be decided against the plaintiff and the plaintiff's case must fall with this finding. The vendees being also sharers in the *thoke*, the plaintiff has no preferential right over the vendees. It is not now necessary to go into the other issues. I dismiss the plaintiff's case on the above finding and order her to bear the costs of both sides.

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On appeal the District Judge of Meerut being "clearly of opinion that the appellant as the widow of a *karibi* relative of the vendors, holding her husband's share by inheritance, is entitled to pre-emption," reversed the first Court's decision, and remanded the case under s. 562 of the Civil Procedure Code for trial on the merits. On the remand, the Court of first instance decided the remaining issues in favour of the plaintiff, and so decreed the claim. On appeal the District Judge affirmed the decree. The defendants appealed to the High Court.

On the 24th January, 1888, the appeal came for hearing before Edge, C.J., and Brodhurst and Mahmood, JJ., who made an order the material portion of which was as follows:—

"We remand this case under s. 566 of the Code of Civil Procedure for a finding as to whether at the date of the sale and at the date of the commencement of this action the plaintiff was in possession of the share in the *thoke* by way of maintenance or by right of inheritance. The share to which we refer is the share by reason of which her pre-emptive right is alleged to accrue."

To this remand the lower appellate Court returned a finding to the effect that at the dates mentioned the plaintiff held her



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share absolutely, by right of inheritance to her deceased husband. No objections were filed to this finding.

The Hon. Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the appellants.

The Hon. *T. Conlan* and Pandit *Bishambhar Nath*, for the respondent.

BRODHURST, J.—Plea No. 1 was withdrawn before we remanded the case under s. 566 of the Civil Procedure Code. The finding on the issue we remanded, namely, “whether at the date of the sale and at the date of the commencement of the action, the plaintiff was in possession of the share in the *thoke* by way of maintenance or by way of inheritance,” is in the plaintiff’s favour, the lower appellate Court having found that Musammat Hardai held her share absolutely as the heir of her deceased husband Jawahir Lal and was thus in enjoyment of it at the time of the sale, and to this finding no objection has been taken. The only other plea that on the former occasion was seriously pressed is No. 2; thus the sole point that remains for consideration is as to the meaning of the *wajib-ul-arz*. The passage in dispute is as follows:—“A shareholder wishing to sell his share will sell it (*i.e.*, offer it for sale) at a fair price, first to a *bhai hakiki* (own brother), after that to ‘*karibi*’ (near), after that to a sharer in the *thoke* or in a second (or another) *thoke*.” The question here is, what is the meaning of the word “*karibi*”?

The difficulty that has arisen on this part of the case is owing to a word having been used that is ambiguous and inadequate to convey clearly the intentions of the shareholders. Obscure language such as that above referred to should not be permitted by any settlement officer to be made use of in a *wajib-ul-arz*.

I have referred to several dictionaries, including those of Forbes, Wilson, Sahakespear, Richardson and Fallon. In none of them is the word “*karibi*” mentioned, but “*karib*” is shown in all of them to mean near either in space or relationship. In Wilson’s Glossary, the meanings of the word are given as “near

near to, also near in relationship, a kinsman, a relative, a connection by birth or marriage excepting the relation of parent and child." "*Karibi*" apparently is not a word that could correctly be used alone, as are the words *karabut-daran* or *rishtadaran* to denote relations, and so far as I can learn it is not generally so used even by uneducated persons.

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The first Court—the Subordinate Judge of Meerut—observes: "Now, the question is whether the plaintiff in this case, who is the aunt of the vendors, that is, the vendors' father's brother's wife comes within the word '*karibi*.' Reading the word "*karibi*" with the preceding word '*bhai hakiki*,' there remains no doubt that both these words '*hakiki*' and *karibi* (real and near) are used in connection with the word *bhai* (brother), and that they both qualify the same word *bhai*. In fact, I see that no other construction can be reasonably put to it. Whoever else may come under the words *bhai karibi*, I do not think that a female relative such as the plaintiff can be brought within those words. If the words *bhai karibi* and *bhai hakiki* be construed strictly, they would not include any but the brothers and cousins. By a broader construction, as the word *bhai* sometimes is used in vernacular common dialogue, it may mean and include some other male near relations, but to include an aunt in the word *bhai* would certainly be going too far and giving it a meaning for which it is never applied." I agree with the Subordinate Judge in thinking that the word *karibi* as well as the word *hakiki* must be read in connection with the word *bhai*.

I was at first much impressed by the arguments of the learned pleader for the appellants, and was strongly inclined to think that the Subordinate Judge had placed a right interpretation on the words above referred to, and I was more especially inclined to think so as the lower appellate Court had given no reason whatever for arriving at a different conclusion; but, having regard to some remarks that fell from my brother Mahmood at the first hearing of the case, I consider that that although *karibi* must be read in connection with the preceding word *bhai*, the words *bhai karibi* must

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be held to include more than cousins; for it appears unreasonable to suppose that the shareholders of the village in question can have intended to allow the right of pre-emption to a second or third cousin and to deny it to a father or an uncle or even to a paternal nephew, who among Hindus is frequently regarded with almost, if not as strong, affection as an own son.

Our attention has been drawn to the judgments in an earlier case, Second Appeal No. 316 of 1886, from the same district of Meerut (1). In that case, the lower appellate Court, the then Judge of Meerut, in considering similar words in a *wajib-ul-arz*, observed: "The decision in this case depends on the interpretation to be put on the *wajib-ul-arz*. That document lays down that an own brother and then a *karibi* and then a co-sharer should have the option of purchase. The words are "*awul bhai hakiki ba bhai karibi*." The lower Court holds that the word *bhai* governs the word *karibi*, and that it is own brothers and then near brothers or cousins that have the preference, and that after them all co-sharers are equal, and consequently the plaintiff and the purchaser both being sharers, the plaintiff has no right of pre-emption over the defendants, the purchaser. In the opinion of this Court the words in the *wajib-ul-arz* mean that after own brothers, persons *karibi*, that is, in any way connected, have a right of pre-emption, and that the word *karibi* is not confined to cousins. Even supposing that the word *karibi* is governed by the word *bhai*, the Court holds that the word *bhai* cannot be confined to cousins, but that the word is used in a much wider sense and means *bhai bund*. Connections, however distant, being of the same stock, are called *bhais*. Under either interpretation the Court holds that plaintiff has a preferential right of pre-emption."

A Bench of this Court [Edge, C.J.] and Straight, J.] in disposing of that second appeal, remarked: "It seems to us that the Judge has placed a reasonable construction upon the *wajib-ul-arz*, and one which we ought not to disturb," and the appeal was accordingly dismissed.

(1) Not reported.

I am now of opinion that the point was properly decided, and I may add that if in the present case the words *bhai karibi* were intended to refer to cousins only, there was no necessity to have previously used the words *bhai hakiki*, as an own brother would have been included in the words *bhai karibi*, he being not only a near *bhai* but the nearest "*bhai*" of all. Moreover, if own brothers and cousins were the only relations that were to be allowed to preempt, own brothers having been clearly mentioned, cousins should not have been referred to in the words *bhai karibi*, but should have been described by the words "*bhai chachera*," "*phuphera*," "*ma-mera*," "*mausera*," according to the intentions of the shareholders.

Having regard to the considerations above mentioned, I think that in order to obtain the meaning intended by the co-sharers, we must not only read the words *karibi* with the word *bhai*, but must also regard the word *bhai* as meaning *bhai bund* or *bhai log*, so that *bhai karibi* shall include all near relations both male and female.

Under these circumstances I am of opinion that this appeal should be dismissed with costs.

EDGE, C.J.—I am of the same opinion.

MAHMOOD, J.—So am I.

*Appeal dismissed.*

## PRIVY COUNCIL.

BASSU KUAR AND OTHERS (PLAINTIFFS) v. DHUM SINGH  
(DEFENDANT).

[On appeal from the High Court for the North-Western Provinces.]

*Act XV of 1877 (Limitation Act), sch. ii, Nos. 64 and 97—Act IX of 1872  
(Contract Act), s. 65.*

Money due on an account stated which would, as such, have been barred in three years from the statement, under Act XV of 1877, sch. ii, art. 64, becomes, for purposes of limitation, a debt of another character, when, it having been the subject of

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an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement failed, the sale not being specifically enforceable, and so declared by decree.

In contemplation of a sale of land by the debtor to the creditor, it was agreed that the book-debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit, brought by the intending vendor for specific performance, was dismissed, on the ground that no effectual agreement had been made.

*Held* that this decree brought about a new state of things, and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration within the meaning of art. 97.

The matter might also be regarded as falling under s. 65 of the Contract Act IX of 1872, under which, when the agreement was decreed ineffectual, the debtor having previously received an advantage under it, was made liable "to restore" that advantage, or "to make compensation for it."

**APPEAL** from a decree (12th March, 1886,) of the High Court, reversing a decree (26th March, 1885,) of the Subordinate Judge of Saharanpur.

The suit out of which this appeal arose was commenced by Lala Baru Mal, lately a Shraf at Saharanpur, with his wife Musamat Bassu Kuar, against Lala Dhum Singh. Baru Mal died pending the suit, and his sons having been joined with the widow as plaintiffs, were now appellants with her.

In 1879, Dhum Singh owing money to Baru Mal, they entered upon an arrangement that Baru Mal, buying villages of Dhum Singh for Rs. 55,000, should give credit for and write off so much as was equal to the debt, receiving only the balance in cash; it appearing from the accounts down to 1st September, 1879, that the debt was Rs. 33,359. The conveyance was to be made to Bassu Kuar, the wife, but, disputes afterwards arising, completion was refused by Baru Mal. On 3rd September, 1880, Dhum Singh sued him for specific performance; but his suit, although decreed by the Court of first instance, was dismissed by the High Court on the 14th March, 1884; that Court holding that there had been no unqualified acceptance of the terms by Baru Mal, and

that no binding contract, enforceable by law, had been made between the parties (1). 1888

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The present suit was brought on the 18th September, 1884, the plaintiff stating that the defendant refused to refund the amount, for which an allowance in the "sale consideration" had been made although, in consequence of his own acts, the contract of sale had been declared by the High Court, on the 14th March, 1884, not to be enforceable; and inferring that the cause of action had arisen on that date.

The defendant by his written statement set up limitation under Act XV of 1877, alleging that nothing had occurred during the transactions and litigation between the parties to alter the nature of the original debt which had accrued in 1879.

The Subordinate Judge, M. Muhammad Maksud Ali Khan, decreed the claim for Rs. 3,359, with interest at 7 annas 9 pies per cent. per month, that being the rate at which it had been entered in the books and in conformity with custom. This decision was reversed on appeal by the High Court in the following judgment:—

"Prior to September, 1879, there had been various transactions between the parties, and these transactions resulted in a debt due by the defendant to the plaintiff of Rs. 33,359-3-6, that being the identical amount which is claimed in the present suit. In September, 1879, the parties entered into negotiations as to the mode in which this debt should be liquidated. The defendant apparently was not in a position at that time to pay in money, but he had certain landed property, and negotiations took place for the sale of this property to the plaintiffs, and the extinguishment of the old debt thereby. These negotiations proceeded so far that the purchase-money was fixed at Rs. 55,000, and it was agreed that the plaintiff should pay this amount by giving credit to the defendant to the extent of the debt due by him and paying the balance in cash. So far the negotiations were completed, except apparently a few minor points. In the end, however, a dis-

(1) Weekly Notes, 1884, p. 161.

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pute arose as to what had been settled as the actual terms of the bargain which were to be reduced into writing. The defendant brought a suit against the plaintiff for specific performance of the contract which he alleged had been settled and executed for the sale to the latter of the property in dispute. That suit was tried by the Subordinate Judge, who decreed the claim. In appeal the High Court reversed the Subordinate Judge's decree, as it appeared that the parties were never *ad idem* with reference to the contract set up by the then plaintiff. It is said now that this Court found that the true contract was not the contract set up by the then plaintiff, but was in fact the contract set up by the then defendant, who is now plaintiff. From the judgment of the Court, however, it appears that this is not what was then decided. All that the judgment shows is that the contract set up in that suit was not proved because there was no evidence that the parties had come to any agreement that that was to be the contract. That is all that was necessary for the decision of that case. The judgment in effect decided that there had been no contract, and the parties were therefore relegated to their original position. In other words, the negotiations failed, because they resulted in an agreement, and the original debt due by the present defendant to the present plaintiff always remained due and is so still. It is alleged that the contract was completed on the 1st September, 1879, and that is therefore the latest possible date we can look to in considering when the money became due. The whole amount had in fact become due before that date by reason of prior transactions, but, upon the view most favourable to the plaintiff, and assuming that an account was stated on that day, giving rise to a new period from which limitation would begin to run, it is impossible to assign the debt to a later date than that. The present suit was brought on the 18th September, 1884, that is to say much more than three years from latest possible date upon which the debt can be said to have become due. Under these circumstances the suit is barred by limitation. The plaintiff's contention is that the contract which he set up was found to have been completed, and under its terms this money having been credited in the present defendant's books, was to be

treated as a payment by the present plaintiff as a deposit on account of the sale, and the present suit is therefore a suit for money had and received, upon a cause of action which did not arise until the contract had gone off, *i.e.*, when this Court decided that the contract set up by the present defendant was not, but that set up by the plaintiff was, binding. I am of opinion that this contention must fail. In the first place, by the terms of the contract itself which is now set up by the plaintiffs, no deposit was payable, and the price was not to be paid till the completion of the contract. Secondly, in the present plaintiff's letter to the defendant demanding payment of the money, and dated the 29th September 1879, the plaintiff did not demand the money of the defendant or ask him to return it as a deposit, but demanded it simply as the balance of the old demand. Under these circumstances it is impossible to treat the money as anything but the old balance due from the defendant to the plaintiff, and as that debt was barred by limitation at the time when this suit was brought, I am of opinion that the Subordinate Judge should have given the defendant a decree. The appeal must be decreed with costs."

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*Mr. R. V. Doyne*, for the appellant, argued that the effect of the respondent's suit upon the agreement, which treated the debt as a subsisting part of the consideration, and to that amount part payment was that the appellant's claim was not barred under article 64, as on a debt upon an account stated in 1879. Upon one view, the transaction between the parties, and the suit for specific performance, showed grounds for deduction of the period occupied by the suit. This would give an addition to the three years, as the suit lasted from 3rd August 1880, to 14th March 1884. Until the agreement for the sale of the land had been finally brought to an end, the appellant was in the position of a person whose claim had been satisfied by the substitution of the land for his debt, and no suit could have been successfully brought. Upon this part of the argument *Musammat Rani Surnomoyi v. Shoshi Mokhi Burmonia* (1) was cited, and it was argued that in another view, and if there was no

(1) 12 Moo. 1. A., 244.



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such suspension of the right to sue upon the account stated, the date itself of the decree, *viz.*, 14th March, 1884, was the starting point of limitation, inasmuch as, on the dismissal of the suit, a new case of action accrued. Also acknowledgment of liability had taken place. [Reference was made by one of their Lordships to *Rue v. Watson* (1) in regard to a suggestion of a temporary lien on so much of the land as would have been covered by the proportionate part of the purchase-money, represented by the debt retained for a time.] It was also argued that the claim should have been held to fall within the Contract Act, IX of 1872, s. 65. The interpretation clause, s. 2, of that Act explained a "void" agreement as being an agreement "not enforceable by law"; and it was submitted that Dhum Singh, on the dismissal of his suit on the 14th March 1884, became bound to pay the amount of the debt previously retained; being made liable, by s. 65, to restore an advantage received under a contract that had become void.

Mr. Charles. H. Hill, for the respondent, argued that the question raised must be disposed of upon the law of limitation as applied in the judgment of the High Court. It was the completion of the contract that alone could turn the retention of the debt into a payment, as the price of the land was not to be paid till then; and the debt remained, from first to last, the balance of the old account. Had there been a complete contract, a decree for specific performance would have followed. He referred to what was expressed in the judgment in *Lachmi Bakhsh Roy v. Ranjit Ram Panday* (2), showing that the law of limitation is strict and inflexible, and argued that article 64 alone could be applied. No later acknowledgement than the commencement of Dhum Singh's suit could be found, and that was too far back to be of any avail to the plaintiff. Reference was also made to the *E. I. Company v. Odit Churn Paul* (3), showing that on a simple contract the breach gave the date of the cause of action, from which the period of limitation commenced, not the time of the refusal to perform the contract. Not till the bringing of the present suit was it ever

(1) 10 H. L., Ca. 679.

(2) 13 B. L. R. 177.

(3) 5 Moo. I A., 43.

alleged that the principal sum now claimed was other than the debt due on the 1st September 1879. No act had been done, with effect to alter the nature of this debt, or to afford a starting point for limitation, other than that date. What was now alleged for the appellant differed from the contention of Baru Mal, in his resisting the suit for specific performance, and was inconsistent with there having been, as the Court decreed, no definite terms of contract settled.

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Mr. *R. V. Doyne* replied, arguing that the 14th March 1884 was the starting point for the period of limitation.

Their Lordships' judgment was delivered by LORD HOBHOUSE.

LORD HOBHOUSE.—The question in this case is whether a debt which at one time was due from the respondent to one Baru Mal, whom the appellants represent, and which has never been paid, has been extinguished by lapse of time. The High Court, differing from the Subordinate Judge, have decided the point against the appellants, and have dismissed the suit brought by them for recovery of the debt.

Baru Mal and Dhum Singh, who were bankers in Saharanpur, had dealings together, and Dhum Singh came to owe Baru Mal Rs. 33,359-3-6. It was then agreed between them that Dhum Singh should convey to Baru Mal or to his wife, Bassu Kuar, certain villages for the sum of Rs. 55,000, and that his debt should be set off against the price. On the 1st September 1879 he executed and delivered to Baru Mal a deed by which he acknowledged the receipt of the whole purchase-money, and conveyed the villages to Bassu Kuar, and he endorsed on the deed a memorandum showing that the balance only of the price, after allowing for the debt, was paid in cash. No money was actually paid.

On the same day Baru Mal took away the deed and signed a letter prepared by Dhum Singh, in which he agreed to register the deed and to pay the balance of the price. But very soon afterwards he found, or alleged, that the deed was not in accordance with certain conditions for which he had stipulated, and, declining

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to complete the purchase, he demanded what was owing to him Dhum Singh on his part insisted that the deed was in accordance with the contract, and after an attempt at arbitration had failed, he brought a suit on the 3rd August 1880, against Baru Mal and Bassu for specific performance of the contract, praying that the deed might be registered, and that Baru Mal might be ordered to pay the balance of the Rs. 55,600 with interest, after setting off the debt of Rs. 33,359-3-6.

On the 24th of February, 1881, the Subordinate Judge decided in favour of Dhum Singh's view, and gave him a decree according to his prayer. Baru Mal appealed to the High Court. After reviewing the evidence, their conclusion was that Dhum Singh did not make out to their satisfaction that the sale deed ever became a contract binding on Baru Mal, and enforceable against him in law. They therefore dismissed his suit. Their decree was made on the 14th of March, 1884 (1).

Upon that event Baru Mal renewed his demands for the payment of his debt, and not being able to get it, he, in conjunction with his wife, Bassu, instituted the present suit on the 10th of September 1884. He is since dead, and his sons have been substituted for him as co-plaintiffs with the widow. In his plaint he states the deed of the 1st of September 1879, and alleges that, in the preparation of the deed, Dhum Singh took steps contrary to the engagement, that so disputes arose, that Dhum Singh unjustly brought a claim for enforcement of the contract, but that the claim was dismissed by the High Court, who held the contract to be invalid. He then claims that the amount for which Dhum Singh had given credit to him in the sale-deed ought to be refunded, and claims interest upon it.

Dhum Singh's defence is that Baru Mal always denied the existence of a contract; that the High Court held there was no contract; that the character of the debt never was altered; and that there was nothing to save it from being barred by limitation.

(1) Weekly Notes, 1884, p. 161.

The High Court hold that this defence is sound in law, and and their decree dismisses the suit as being barred by limitation. They do not state under which article of Act XV of 1877 the case falls; but they consider Baru Mal's claim to be for nothing but the old balance due from Dhum Singh. Probably they would hold it to fall, as was argued at their Lordships' bar, under article 64 (in the second schedule); therefore, as none of the statutory provisions by which the time for suing is enlarged can be applied to this case, except that which relates to acknowledgment, and as no written acknowledgment can be found later than the plaint filed by Dhum Singh in the specific performance suit, Baru Mal's right to sue would be barred at latest long before he sued.

Their Lordships find themselves unable to agree with the High Court as to the nature of the claim. They think that it is substantially put upon the right ground in the plaint. It must be remembered that it has throughout been common ground to both disputants, that there was a contract made between them, and that among its terms were the sale of the villages for Rs. 55,000, the retention by Dhum Singh of his debt of Rs. 33,359-3-6 as part payment, and the payment by Baru Mal of the balance. Their quarrel was about other matters. Dhum Singh alleged that the terms just mentioned were all the terms of the contract, and he claimed its completion on that footing. Baru Mal alleged that there were other terms, accused Dhum Singh of dishonesty, and after a time claimed the right of receding from the bargain altogether. But the Subordinate Judge took the view of Dhum Singh, and decreed completion of the contract according to that view. Up to the date of the Subordinate Judge's decree in 1861, Dhum Singh retained the amount of his debt as of right, and in accordance with the contract alleged by him. After the decree of 1881 he still retained it as of right, and with a title which could not be disputed in any Court of Justice, except by the one mode of appeal from the decree of 1881. Baru Mal might have sued for his debt, but the utmost benefit that could have come to him from such a suit would have been to have it suspended or retained in Court till

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after decision of the appeal in the specific performance suit. Dhum Singh's defence would have been that the debt was paid by virtue of the contract, and that defence must have prevailed if the suit were heard while the decree of 1881 still stood unreversed. It would be an inconvenient state of the law if it were found necessary for a man to institute a perfectly vain litigation under peril of losing his property if he does not. And it would be a lamentable state of the law if it were found that a debtor who for years has been insisting that his creditor shall take payment in a particular mode, can, when it is decided that he cannot enforce that mode, turn round and say that the lapse of time had relieved him from paying at all.

In their Lordships' view, the decree of the High Court in 1884 brought about a new state of things, and imposed a new obligation on Dhum Singh. He was now no longer in the position of being able to allege that his debt to Baru Mal had been wiped out by the contract, and that instead thereof Baru Mal was entitled to the villages. He became bound to pay that which he had retained in payment for his land. And the matter may be viewed in either of two ways, according to the terms of the Contract Act, IX of 1872, or according to the terms of the Limitation Act, XV of 1877.

By the 65th section of the Contract Act "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it." In this case there most certainly was an agreement, which, as written, was in the terms alleged by Dhum Singh. But it was held not to be enforceable by him because there were other unwritten terms which he would not admit; and the other party did not seek to enforce the agreement according to his version of it, but threw it up altogether. The agreement became wholly ineffectual, and was discovered to be so which the High Court decreed it to be so. The advantage received by Dhum Singh under it was the retention of his debt. Therefore by the terms of the statute he became bound to pay his debt on the 14th March, 1884.

Trying the case by the terms of the Limitation Act, their Lordships think that it falls within article 79. An action for money paid upon an existing consideration which afterwards fails, is not barred till three years after date of the failure. A debt retained in part payment of the purchase money is in effect, and as between vendor and purchaser, a payment of that part; and if that were doubtful on the first retention while there was yet undecided dispute, it could no longer be doubtful when a decree of a Court of justice authorized the retention, and in effect substituted the land for the debt. Dhum Singh retained the money, and Baru Mal lost the use of it, in consideration of the villages which formed the subject of the sale-deed. That consideration failed when the decree of 1884 was made, and it failed none the less because the failure was owing to Baru Mal's own reluctance to take it under the conditions insisted on by Dhum Singh.

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The result is that in their Lordships' opinion the High Court ought to have sustained the Subordinate Judge's decree, and to have dismissed the appeal with costs, and they will now humbly advise Her Majesty to reverse the decree of the High Court, and to make an order to that effect. The respondent must pay the costs of the appeal.

*Appeal allowed.*

Solicitors for the appellant: Messrs. T. L. Wilson and Co.

Solicitors for the respondent: Messrs. Barrow and Rogers.

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## APPELLATE CIVIL.

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 June 26.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.*

CHUNNI KUAR (PLAINTIFF), v. RUP SINGH (DEFENDANT).\*

*Unconscionable bargain—Maintenance—Gambling in litigation—agreement opposed to public policy—Act IX of 1872 (Contract Act), s. 23.*

The result of the English cases regarding "hard" or "unconscionable bargains" is that in dealings with expectant heirs, reversioners or remaindermen, the fact that

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\* First Appeals Nos. 8 and 40 of 1887 from the decrees of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 16th December, 1886.

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the bargain was declined by others as not being sufficiently advantageous does not raise a presumption that it was fair and reasonable; and that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the Court may presume that a bargain which apparently provides, in the opinion of the Court, for an unusually high return or for an exceptionally high rate of interest, is a hard and unconscionable bargain against which relief should be granted. The doctrine of equity on the subject of such bargains is applicable in England only to dealings with expectant heirs, reversioners or remaindermen. The judgment of the Privy Council in *Srimati Kamini Sundari Chaudhrani v. Kali Prossunno Ghose* (1) does not imply that the doctrine is to be applied in India to cases except where it would have been applied in England, or except where the case is in some way analogous to a case of snatching a bargain with an expectant heir, reversioner or remainderman, or except there is some fiduciary relationship between the lender and the borrower although there may be no fraud or undue influence, or except there is some incapacity, such as ignorance, on the part of the borrower to appreciate the true effect of his bargain.

The judgment of the Privy Council in *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (2) shows that while the specific English law of maintenance and champerty has not been introduced into India, and while fair agreement to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bond fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced.

For the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs. 25,000, upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time, he was without even the means of subsistence; that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him; that no fraud or improper pressure appeared to have been applied to him; that his legal advisers had acted honestly and to the best of their ability in his interest; that there

(1) L. R., 12 I. A., p. 215.

(2) L. R., 4 I. A., 23.

was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond; that without such assistance he could not have appealed to the High Court; and that the obligee gave him such assistance upon his application.

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*Held* that although there was nothing to show that the obligor could have obtained an advance on terms more advantageous to himself, it was for the obligee to establish to the Court's satisfaction, without reasonable doubt, that he could not have done so; and that, this not having been established, and the reasonableness and fairness of the bargain not being proved by showing that there had been difficulties in negotiating it, or that others had refused it as not sufficiently advantageous to them, the Court should hold the bargain to be a hard and unconscionable one, which should not be enforced.

*Held* also that the obligee could not, under the circumstances, have considered both that the obligor's claim was a just one and reasonably likely to succeed, and that the Rs. 25,000 was a reasonable recompense in the event of success for the advance of Rs. 3,700; and the bond was therefore a gambling in litigation, which it would be contrary to public policy to enforce.

The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 per cent. per annum from the date of the bond to the date of the decree, with costs in proportion, and interest at 6 per cent. per annum on the Rs. 3,700 interest and costs, from the date of the decree until payment.

The facts of this case are fully stated in the judgment of the Court.

Mr. *Dwarka Nath Banerji* and Pandit *Moti Lal Nehru*, for the appellant.

Mr. *Roshan Lal* and Mr. *Malcomson*, for the respondent.

EDGE, C.J., and TYRELL, J.—In the suit out of which these two first appeals arise, Bibi Chunni Kuar sued Raja Rup Singh on his bond, dated the 10th December, 1878, for Rs. 25,000 with future interest at one per cent. from the date of the institution of the suit to the date of realization; she also claimed the costs of the suit. In her plaint she alleged that the defendant had, in 1877, instituted a suit *in forma pauperis* against Rani Baisni and the Collector, as Manager of the Court of Wards, for the recovery of the estates of Raj Barah; that the suit was dismissed, and that in order to enable him to file an appeal to this Court, he borrowed from her Rs. 3,700 on the 10th December, 1878, and the considera-



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tion of that advance executed the bond in suit, by which he promised her to pay Rs. 25,000 within a year from recovery of possession of the estate. In the plaint it was also alleged that the appeal to this Court was dismissed, and that subsequently the defendant executed a sale-deed in favour of the plaintiff and others in respect of the costs of an appeal to the Privy Council, in which he admitted that the debt sued for would, in future, be due by him, that a decree was passed by the Privy Council in the defendant's favour (1), and he obtained possession of the estate on the 13th August, 1884, but still evades payment of the debt due under his bond.

The defendant by his written statement pleaded amongst other things that the contract was one of champerty and, as such, illegal, that it was void as being contrary to the provisions of ss. 23 and 30 of the Indian Contract Act; that the plaintiff had not given any portion of the Rs. 3,700 to the defendant; that the moneys for the expenses incurred in this Court were advanced by Maulvi Muhammad Mohsin out of his own pocket; that the bond did not provide that the money would be paid in case of the defendant succeeding in the Privy Council, and that the defendant not having succeeded in this Court, the plaintiff was not entitled to make her claim.

The suit was heard by the then Subordinate Judge of Mainpuri, who held that the claim was not based on champerty; that ss. 23 and 30 of the Indian Contract Act did not apply; that the provision in the bond as to payment on the defendant succeeding was a general one and was not confined to the event of his succeeding in the High Court. The Subordinate Judge found that the defendant had received the consideration of the bond. The Subordinate Judge also found that the defendant's contract was entered into at a time when he was not in a composed state of mind, that at that time the defendant was without means and had to provide for an expense of several thousands of rupees at a critical time, and held that, under the circumstances, the plaintiff was not entitled to the full amount sued for, but only to the amount actually advanced with interest and costs. The Subordinate Judge on the 16th

(1) L. R., 11 I. A. 149; I. L. R., 7 All., 1.

of December, 1886, made a decree for 'Rs. 6,722-13-9 with proportionate costs and interest at 8 annas *per centum*, from the date of the suit to the 15th December, 1886, on the principal sum and thenceforth on the aggregate amount as against the defendant, and dismissed the rest of the claim with proportionate costs to the defendants, and allowed the pleader's fees in full. From that decree the plaintiff and the defendant respectively appealed. Their appeals were heard by us, and we took time to consider our judgment.

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The facts of the case are few and simple. The defendant on the death of his nephew, which happened in or shortly prior to 1877, made a claim to the Raj Barah estates. That claim was disputed, and in order to establish his title to the estates it became necessary for the defendant to institute a suit. At that time and until the defendant obtained his decree in the Privy Council, he was without any means, even the means, of subsistence, and had no money except what he from time to time managed to borrow from others. He had, however, a friend, Maulvi Muhammad Mohsin, a vakil, who had previously acted for him, and who also acted for him in some of the stages of the litigation as to the Raj Barah estates and in negotiating, amongst others, the loan in respect of which the bound in suit was given. The defendant requested Maulvi Muhammad Mohsin to assist him to bring a suit for possession of the estates. In view of the large expenses which such a suit would probably involve, Muhammad Mohsin hesitated, but ultimately Muhammad Mohsin and Babu Hemraj, a pleader, undertook to institute on behalf of the defendant a suit *in forma pauperis*. That suit was instituted, on the 24th July 1877, in the Court of the Subordinate Judge of Mainpuri. Whilst that suit was pending in the Court at Mainpuri, the defendant and Lala Punni Lal agreed that Lala Punni Lal should assist the defendant to take his case in the Privy Council, and should for such assistance raise one lac of rupees. Muhammad Mohsin, on being informed by Lala Punni Lal of this agreement, told the defendant that he had made a mistake in agreeing to give a lac of rupees

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to Lala Punni Lal without consulting him, Muhammad Mohsin. At that time the defendant had executed a *vakalatuama* in favour of Muhammad Mohsin and Babu Hemraj, who were conducting the defendant's suit in the Court at Mainpuri. The defendant told Muhammad Mohsin that he had given his word to Lala Punni Lal, but that Muhammad Mohsin was to do what he could for him. Muhammad Mohsin replied that he and Babu Hemraj were willing to assist and provide for the expenses in the Court at Mainpuri, but that as the matter had been negotiated with Lala Punni Lal, he, Muhammad Mohsin, would ask Lala Punni Lal not to interfere with the suit in the Court of first instance, and to take Rs. 75,000 for assisting in the conducting of the case in this Court and in the Privy Council, that is, that Lala Punni Lal should receive a bond for Rs. 25,000 if it should be necessary to prosecute or defend an appeal in this Court, and a further bond for Rs. 50,000 if it should be necessary to conduct or defend an appeal in the Privy Council. The defendant's suit was dismissed by the Subordinate Judge of Mainpuri. After the suit was dismissed in the Court at Mainpuri, it was, at first, intended that the defendant should file an appeal to this Court *in forma pauperis*, and that Lala Punni Lal should not be called upon for assistance. However, a well-known and most respected vakil of this Court, Munshi Hanuman Prasad, who has recently died, advised that the defendant could not get leave to appeal *in forma pauperis* except on grounds of law, and that the law did not provide for the re-admission of an appeal after it had been rejected *in forma pauperis*. The effect of the opinion of Munshi Hanuman Prasad was communicated to the defendant by his general attorney, Ganga Prasad, after which the defendant and Ganga Prasad went to Lala Punni Lal at Mainpuri, and after some discussion Lala Punni Lal agreed to the terms which, as we have above mentioned, had been suggested by Muhammad Mohsin to the defendant, that is to say, he agreed to defray the expenses of an appeal in this Court on receiving the defendant's bond for Rs. 25,000, and further, if necessary, to provide for the expenses of an appeal to the Privy Council in consideration of the defendant giving him his bond for Rs. 50,000.

Muhammad Mohsin applied to Lala Punni Lal to advance Rs. 3,700 for the purpose of filing and prosecuting the defendant's appeal in this Court. The defendant having executed the bond in suit on the 10th December 1879, Lala Punni Lal advanced the Rs. 3,700, and that sum was applied in the following manner :—Rs. 2,500 was paid for the stamps required for the memorandum of appeal, Rs. 200 were paid for the translation fees, and Rs. 1,000 paid to the vakils employed on behalf of the defendant in this Court in his appeal, as their fees. Bibi Chunni Kuar was the wife of Lala Punni Lal, in whose favour the bond of the 10th December 1878, was executed by the defendant. On the 18th December 1878, the defendant's appeal to this Court was filed through Pandit Ajudhia Nath and the late Pandit Nand Lal, who, for the purposes of that appeal, were his vakils in this Court. The defendant's appeal was dismissed by this Court on the 7th May 1880. Shortly before or after the dismissal by this Court of the defendant's appeal, Lala Punni Lal died. After the death of Lala Punni Lal and the dismissal of the defendant's appeal by this Court, Muhammad Mohsin on behalf of the defendant applied to the plaintiff, Chunni Kuar, to advance the money required for an appeal to the Privy Council on a bond being given in his favour. Chunni Kuar replied that she had no one to look after her business, and she was therefore not prepared to undertake the expenses of the appeal alone. The defendant urged Muhammad Mohsin to get an appeal to the Privy Council filed, and represented to him that he, the defendant would not mind parting with a four annas or an eight annas share in the Raj Barra state, or giving a lao of rupees for the necessary assistance. After several fruitless attempts to negotiate a loan, Muhammad Mohsin at last succeeded in getting several persons, Chunni Kuar being one of them, to agree to provide for security for the costs of the contemplated appeal to the Privy Council to the extent of Rs. 4,000 and for translation charges, pleader's fee, and other expenses of every kind to the extent of Rs. 8,500, on the terms which are contained in the deed executed in their favour by the defendant on the 13th March, 1882. In the defendant's deed on the 13th March 1882, the defendant acknowledged his liability

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to the plaintiff, Chunni Kuar, under his bond of the 10th December 1878, which is now sued on. The plaintiff, Chunni Kuar, and the other parties, who had agreed as above mentioned, provided the necessary security and the moneys which were required. The defendant filed the appeal to the Privy Council on the 9th November 1880. On the 14th April, 1884, the defendant obtained a decree in the Privy Council, which established his title to the Raj Barah estates and the accumulated income. The respondents in the appeal in the Privy Council applied for a review of judgment, which application was dismissed. It is admitted on the pleadings that the defendant on the 13th August 1884, obtained possession of the Raj Barah estates. He has declined to discharge his bond of the 10th December 1878, and has repudiated all liability under it, and also all liability under the deed of the 13th March 1882. In addition to the facts which have been found by us as above, we find as a fact that the defendant perfectly understood his position and the effect of the bond of the 10th December 1878, and the sale-deed of the 13th March 1882; that there was no pressure brought to bear upon the defendant to execute the bond of the 10th December 1878, and the sale-deed of the 13th March 1882, other than the pressure of the position in which the defendant owing to his poverty found himself placed; that Muhammad Mohsin and Ganga Prasad acted throughout in the negotiations honestly and to the best of their ability in furtherance of the interests of the defendant, and that there is nothing to show that the defendant could have obtained the necessary assistance for the filing and prosecution of his appeal in this Court on better terms than those on which that assistance was actually obtained, which are the terms contained in his bond of the 10th December 1878. Without that assistance the defendant could not have appealed to this Court. We also find that it was the defendant who applied to Lala Punni Lal for assistance. Mr. *Roshan Lal*, who, with Mr. *Malcomson*, appeared for the defendant before us, contended in the first place that the bond of the 10th December 1878 was inadmissible in evidence, as it had not been registered under the Indian Registration Act, and, secondly, that on the true

construction of the bond, the Rs. 25,000 was payable only in the event of the defendant succeeding in this Court in the appeal which he filed on the 18th December, 1878, and that having failed in that appeal the defendant was under no liability under the bond. As to Mr. *Roshan Lal's* first point, it is sufficient to say that he cited no section of the Indian Registration Act and no authority in support of his contention, and that the Indian Registration Act does not prohibit bonds of this description being given in evidence if not registered. As to his second point, the bond does not, in our opinion, bear the narrow construction which he attempted to place upon it, a construction, moreover, which would defeat the intention of the parties at the time when Lala Punni Lal agreed to advance the money required for the appeal to this Court.

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Mr. *Malcomson*, on behalf of the defendant, contended that the bargain was unconscionable and was against public policy, and that we should apply to the transaction the principles which the Courts of equity in England have applied to dealings with reversioners. It was also contended on behalf of the defendant that as the plaintiff had not in the event and alone undertaken all the expenses of the appeal to the Privy Council, she was not entitled to recover on the bond of the 10th December, 1878. It appears to us that the bond of the 10th December, 1878, and the sale-deed of the 13th March, 1882, are two separate contracts, and further that as the defendant in the latter document acknowledged his liability under the former, the point, even if it were otherwise a good one, is not now open to him. Mr. *Banerji* on behalf of the plaintiff contended that the agreement was under the circumstances of the case a fair and reasonable one, that it was not unconscionable or against public policy, and that the principles applicable to dealings with reversioners were not applicable to this case. In the course of the arguments of Mr. *Malcolmson* and Mr. *Banerji*, the following authorities amongst others were referred to, namely, *Srimati Kamini Sundari Chaodhrani v. Kali Prossunno Ghose* (1), *Grose v. Amir-*

(1) L. R., 12, I. A., at pp. 225 and 226.

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If the law of England as to maintenance applied in this country, it is clear to our minds that it would apply in this case, and that it would be our duty to hold that the bond of the 10th December, 1878, was void. As far back as 1862, it was in the case of *Ganesh Prasad v. Sheo Ratan Lall and Fakeer Chund* (17) held by the Sadar Diwani Adalat of these Provinces, following a previous decision of that Court and a Full Bench decision of the Court at Calcutta, that the laws and regulations in force in this country did not make it necessary to apply the English law of champerty to its full extent, and no doubt the same would have been held by that Court as to the English law of maintenance. It has now finally been decided by the Privy Council in *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (7) that the specific English law of maintenance and champerty has not been introduced into India. At page 46 their Lordships are reported to have said, "But whilst their Lordships hold that the specific English law of maintenance and champerty has not been introduced into India, it seems clear to them upon the authorities that contracts of this kind or character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend

(1) 4 B. L. R. O. C. J., 1

(2) 20 W. R., 446.

(3) 22 W. R., 535.

(4) 13 B. L. R. P. C., 509.

(5) 8 Moo. I. A., 170.

(6) 12 Moo. I. A., 301.

(7) L. R., 4 I. A., pp. 46 and 47.

(8) 2 Ves., 125.

(9) 2 Ves. & B., 117.

(10) 2 Ch. App., 542.

(11) 11 Eq., 265.

(12) 8 Ch. App., 484.

(13) 10 Ch. App., 389.

(14) I. L. R., 1 Cal., 108.

(15) I. L. R., 9 All., 74.

(16) I. L. R., 9 All., 690.

(17) S. D. A. N. N.-W. P., 1862, Vol. I, p. 501.

to render them so have been adverted to in the two judgments of this tribunal already cited. Their Lordships think, it may properly be inferred from the decisions above referred to, and especially those of this tribunal that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being per se, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property and no means except the property itself, should be assisted in this manner. But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for the purpose of gambling in litigation, or of injuring or oppressing others by abetting or encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them."

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In that judgment, most of the decisions in the Privy Council and in India, dealing with the subject, were considered. The decision of the Privy Council in *Srimati Kamini Sundari Chaodhrani v. Kaly Prossunno Ghose*(1) is of great importance, as it shows that in India the Courts may apply to cases in which the dealings sought to be impugned were not with expectant heirs, reversioners or remaindermen, the doctrines or principles which the courts of equity of England have applied to hard or unconscionable bargains with expectant heirs, reversioners or remaindermen. In that case, their Lordships are reported to have said (pp. 225 and 226), "The finding of the Lower Court against fraud and undue influence must now be accepted; a contrary finding would have avoided the whole transaction. But assuming the validity of the mortgage, a question arises whether under the circumstances the rate of interest exacted did not amount to a hard or unconscionable bargain such as a court of equity will give relief against. The doctrine of equity on this subject was laid

(1) L. R., 12 I. A., 215.



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down by the Master of the Rolls in *Beynon v. Cook* (1), and his judgment was affirmed by the Court of Appeal. Rhys Beynon was a reversioner or remainderman, Cook was a money-lender who took from him a promissory note for £100, for which he charged £15 discount for six months, and a mortgage of his reversionary interest, with interest at the rate of 5 per cent. per month. The Master of the Rolls made a decree for redemption on payment of the amount advanced at simple interest at 5 per cent per annum. He observed: 'The point to be considered is was that a hard bargain? The doctrine has nothing to do with fraud. It has been laid down in case after case that the Court, wherever there is a dealing of this kind, looks at the reasonableness of the bargain, and, if it is what is called a hard bargain, sets it aside. It was obviously a very hard bargain indeed, and one which cannot be treated as being within the reasonableness which has been laid down by so many Judges.' This equitable doctrine appears to have a strong application to the facts of this case, where we have a borrower a *pardanashin* lady; the lender, her own mukhtar, under the cloak of a benamidar; the security an ample one, as abundantly appears; the interest on both mortgages, especially the compound interest on the latter, exorbitant and unconscionable; and a purchaser with full notice of these circumstances."

It is to be observed that, although their Lordships allude to the fact that the borrower was a *pardanashin* lady and the lender her own mukhtar under the cloak of a benamidar, they accepted the finding of the Lower Court that there had been no fraud or undue influence.

The difficulty which we feel is as to what constitutes a hard and unconscionable bargain. In some of the English cases stress was apparently laid on the fact that the security had not been valued. Yet Sir George Jessel, M. R., in *Beynon v. Cook* (1) at page 392, after showing that in many instances in which the Courts of equity applied the doctrine under consideration, the value of the security could not be ascertained, expressly stated that "the value

(1) 10 Ch. App., 389.

of the security is not an element for consideration." He said at page 393: "The object of the rule is to prevent the distress of the reversioner being taken advantage of, and to protect him, according to Mr. Swanston (2 Sw. 150 n.) "against the designs of that calculating capacity which the law constantly discountenances, the distress frequently incident to the owners of profitable reversions, and the improvidence with which men are commonly disposed to sacrifice the future to the present."

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Lord Selborne, L. C., in *Aylesford v. Morris* (1), having referred to the repeal of the usury laws and the effect of the 31 Vic., c. 4, said: "These changes of the law have in no degree whatever altered the *onus probandi* in these cases, which, according to the language of Lord Hardwick in *Chesterfield v. Janssen* (2), raises from the circumstances or conditions of the parties contracting, weakness on one side, usury on the other, or extortion, or advantage taken of that weakness,—a presumption of fraud. Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of the circumstances or conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction cannot stand, unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been in point of fact fair, just and reasonable." After referring to some of the considerations which had prevailed in cases in which this doctrine of equity had been applied, he, at page 492, said: "But the real truth is that the ordinary effect of all the circumstances by which these considerations are introduced is to deliver over the prodigal helpless into the hands of those interested in taking advantage of his weakness; and we so arrive in every such case at the substance of the conditions which throw the burden of justifying the righteousness of the bargain upon the party who claims the benefit of it."

How the righteousness of the bargain could, if contested, be established we find it difficult to see, if the value of the security at the time when the bargain was made is to be excluded from

(1) 8 Ch. App., 484.

(2) 2 Ves., 125.

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consideration. In the case of *Chesterfield v. Janssen* (1) and in *Bowes v. Heaps* (2) the borrower had offered the security to several persons who had rejected it as not sufficiently advantageous, before it was finally accepted by the party against whom relief was decreed. Sir William Grant, M. R., in *Bowes v. Heaps* (2), at p. 119 said: "It is not imputed to them (the defendants) that they used any endeavours to prevail upon the plaintiff to enter into the transaction. They merely acceded to the proposal that was made to them. It is not, however, every bargain which distress may induce one man to offer that another is at liberty to accept. The mere absence of fraud does not necessarily decide upon the validity of the transaction; as is proved by many cases, from *Banny v. Pitt* down to *Gwynne v. Heaton*. In the latter, Lord Thurlow says, the defendant is not charged with misleading the plaintiff's judgment or tampering with his poverty. In that case, too, as in this, the bargain had been hawked about and offered to many persons. That, Lord Thurlow says, only shows the distress of the borrower," and at the same page Sir William Grant also said: "It would not, I think, be endured that a money-lender should take from a distressed man, dealing for his reversionary interest, an engagement to pay four to one upon the contingency of a person, of the age of twenty-seven in perfect health, out-living another of the age of thirty-two, debilitated by disease and ruined in constitution by long continued habits of intemperance." After referring to the nature of the risk in that case, Sir William Grant, at page 120, said: "Allowing the risk to be still considerable, against that must be set the unusual amount of the stipulated return. Combining the two together, it seems to me that there is more inequality in this bargain than existed in some of the cases in which the contract has been set aside," and he granted relief.

The result of the English cases appears to be that in dealings with expectant heirs, reversioners or remaindermen, the fact that the bargain was declined by others as not being sufficiently advantageous does not raise a presumption that it was a fair and reason-

(1) 2 Ves., 125.

(2) 3 Ves. & B., 117.

able bargain; and that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the Court may presume that a bargain which apparently provides, in the opinion of the Court, for an unusually high return or for an exceptionally high rate of interest is a hard and unconscionable bargain, against which relief should be granted. The doctrine of equity to which we are referring is, so far as we are aware, applicable in England only to dealings with expectant heirs, reversioners or remaindermen. Sir George Jessel, M. R., in *Beynon v. Cook* (1), at p. 392, said: "It has never been said a man can be relieved because he happens to be a reversioner, and the money-lender does not know it but lends him money upon his promissory note at usurious interest. In order to be relieved, he must have been trusted upon the credit of his expectation." Many of the considerations stated by the earlier Equity Judges in England for the doctrine we are considering do not arise in cases such as that which we have to decide here. We do not gather from the judgments of their Lordships of the Privy Council in *Srimati Kamini Sundari Chaodhrani v. Kali Prossunno Ghose* (2) that the doctrine which the Courts of Equity in England have applied to cases of snatching bargains with expectant heirs, reversioners or remaindermen, is to be applied in India to cases except where it would have been applied in England or except where the case is in some way analogous to a case of snatching a bargain with an expectant heir, reversioner or remainderman, or except there is some fiduciary relationship between the lender and the borrower, although there may be no fraud or undue influence, or except there is incapacity, such as ignorance, on the part of the borrower to appreciate the true effect of his or her bargain. To apply it to all cases where the contracted return was exceptionally large or the rate of interest was high would be for the Judges to make contracts for the parties which they never intended to make for themselves.

In our opinion Sir George Jessel, M.R., in *Wallis v. Smith* (3) with sound common sense said: "I have always thought, and

(1) 10 Ch. App., 389. (2) L. R., 12 1. A., 215.

(3) L. R., 21 Ch. D., 243.

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still think, that it is of the utmost importance as regards contracts between adults, persons not under disability, and at arm's length, that the Courts of law should maintain the performance of the contracts according to the intention of the parties; that they should not overrule any clearly expressed intention on the ground that Judges know the business of the people better than the people know it themselves. I am perfectly well aware that there are exceptions but they are exceptions of a legislative character."

We have arrived at the conclusion, but we confess after much doubt and difficulty that we may hold that this is a case to which we may apply the ruling of their Lordships of the Privy Council in *Srimati Kamini Sundari Chaodhrani v. Kali Prossunno Ghose* (1) to which we have referred, and which is to be found at pages 225 and 226 of the report of that case. There was in this case, so far as we see, no fraud on the part of Lala Punni Lal or the plaintiff or on the part of the agents of the defendant. The defendant entered into the contract with his eyes open and on the advice of his legal advisers, and we doubt if he could at that time, having regard to the risks of his litigation, have obtained an advance of money on terms more advantageous to himself; but that he could not have done so is not sufficiently established by the plaintiff, and it was for her to leave our minds without any reasonable doubt on the point. As we have pointed out, mere difficulties in negotiating a bargain, or the fact that the bargain was refused by others as not sufficiently advantageous, have not been held to prove that the bargain was a fair and reasonable one and not a hard and unconscionable bargain within the meaning of the rule. Under the circumstances we find that the bargain was a hard and unconscionable one, which we ought not to enforce.

On the ground also to which we shall now refer we are of opinion that we should not enforce this contract. Gambling in litigation and what are called in England maintenance and champerty are unfortunately only too common in this country. The abuses which in 1869, Phear, J., in his judgment in *v. Grose v.*

(1) L. R., 12 I. A., 215.

*Anirtamayi Dasi* (1) stated to exist in every Court of civil justice throughout Bengal, unfortunately exist at the present day in these Provinces. Although fully recognising that in India, as was pointed out by the Lordships of the Privy Council in *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (2), "a fair agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy," their Lordships were careful to add: "But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party, or to be made, not with the *bond fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation or of injuring and oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy, effect ought not to be given to them." Now in this case it appears to us that if Lala Punni Lal or the plaintiff believed the defendant's claim to have been a just one, or one in which there were not long odds against his chance of success, Rs. 25,000 in the event of success for an advance of Rs. 3,700 could not be and could not have been considered by them or either of them to be reasonable recompense. On the other hand, if Rs. 25,000 were or were considered to be a reasonable recompense in the event of success for an advance of Rs. 3,700, it could only be on the ground that the plaintiff's claim was of such a highly speculative character as to make the odds long against his chances of success and the transaction one of gambling in litigation. In either view we are of opinion that to enforce such a contract as that in this case would be against public policy, as it would be only to encourage parties not interested in a litigation to assist, for their own private purposes, a litigant to pursue a litigation in the success of which on the basis of a just claim they did not honestly believe, or for their assistance in which they required an unreasonably large recompense.

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(1) 4 B. L. R., 1.

(2) L. R., 4 I. A., pp. 46 and 47.

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Although we are of opinion that we should not enforce the contract in this case by decreeing the plaintiff's claim for Rs. 25,000, we are also of opinion that we should give, as we now do, the plaintiff a decree for the amount actually advanced with simple interest at the rate of 20 per cent. per annum from the date of the bond, that is to say, from the 10th December, 1878, to the date of this decree with proportionate costs of suit and of the plaintiff's appeal, and with interest at the rate of 6 per cent. per annum on the amount of such advance, interest, and costs, from the date of this decree until payment. The defendant's appeal is dismissed with costs and the plaintiff's appeal is allowed to the extent above indicated with proportionate costs. We have allowed interest at the rate of 20 per cent. per annum, as that is not an unusual rate in these Provinces where there is no security or but a doubtful security.

*Appeal allowed in part.*

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 July 10.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

JANGI NATH AND OTHERS (PLAINTIFFS) v. PHUNDO AND ANOTHER (DEFENDANTS).\*

*Civil Procedure Code, ss. 244, 283—Decree against mortgagor for mortgage money and directing sale of mortgaged property as against him and a third party—Attachment of other property in possession of third party as that of the mortgagor—Claim by third party to ownership of such property—Suit by decree-holder to establish mortgagor's right to property.*

In a suit upon a hypothecation bond a third party was made defendant as she claimed the hypothecated property. The mortgagee obtained a decree for recovery of the amount of the bond and for enforcement for the mortgage. In execution of the decree the debt not being satisfied by sale of the mortgaged property, the decree-holder caused certain other immoveable property in the possession of the third party to be attached. She objected to the attachment on the ground that this property was her own, and was not liable to sale in execution of the decree. The objection was allowed and the decree-holder then sued for a declaration that the property belonged to the mortgagor judgment-debtor, and was liable to attachment and sale in execution of the decree.

\* First Appeal No. 85 of 1886 from a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Agra, dated the 14th November, 1885.

*Held* that as no claim in the former suit was made against the objector personally or in a representative character, but, as regards her, the only claim was virtually for a declaration that she was not entitled to the hypothecated property, the decree affected her only so far as it negatived her alleged interest in that property, and, so far as it was sought to be enforced against other property, she was a stranger to that suit, and her objection must be taken to have been decided under ss. 278 and 280 of the Civil Procedure Code, and the present suit was rightly brought under s. 283 and was not barred by s. 244. *Kameshwar Pershad v. Run Bahadur Singh* (1) referred to. *Malmantri v. Ashfaq Ahmad* (2) and *Nimba Harishet v. Sitaram Paraji* (3) distinguished.

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THE facts of this case were as follows. On the 13th February, 1876, Bhika Mal, styling himself son of Dwarka Das and proprietor of the firm of Dwarka Das Bhika Mal, executed an instrument in favour of Babu Baijnath, whereby he promised to pay Rs. 15,000 to the latter, and mortgaged certain immoveable property as security for the payment of the money. In July, 1882, Baijnath brought a suit on this instrument against Bhika Mal, styling him the "adopted son" of Dwarka Das, and against Musammat Phundo, widow of Dwarka Das. In this suit Baijnath claimed to recover the money due under the instrument from Bhika Mal personally, and by the sale of the mortgaged property, "by enforcement of lien as against both defendants." He stated in the plaint in this suit with reference to Musammat Phundo as follows:—"As the defendant No. 2 now declares herself proprietor of the whole property, she has also been impleaded although she has no right to the property, and defendant No. 1 (Bhika Mal) is the owner of the property and of the share of Dwarka Das, because he was his own brother and was adopted by him, and he is a proprietor by right of inheritance."

The plaintiff's contention in this suit was that Bhika Mal, step-brother of Dwarka Das, was his adopted son and sole heir, and had inherited the mortgaged property from Dwarka Das. Musammat Phundo contended that Bhika Mal was not the adopted son of Dwarka Das; that the mortgaged property was the separate property of her husband to which she had succeeded, and that Bhika

(1) I. L. R., 12 Calc., 453.

(2) I. L. R., 9 All., 605.

(3) I. L. R., 9 Bom., 458.



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Mal had no authority to mortgage the property, and it was not liable to the plaintiff Baijnath's claim. On the 17th January, 1883, Baijnath obtained a decree in this suit for the recovery of the money claimed from Bhika Mal, and for enforcement of the mortgage contained in the instrument of the 13th February, 1876.

The mortgaged property having been sold, and the mortgage debt not being satisfied, Baijnath caused certain immoveable property in the possession of Musammut Phundo to be attached in the execution of the decree as the property of Bhika Mal. Musammat Phundo objected to the attachment, alleging that she had inherited the property from her deceased husband, Dwarka Das, and it was not liable to be attached and sold in execution of Baijnath's decree against Bhika Mal. This objection was allowed by the Court executing the decree on the 13th March, 1885. In May, 1885, Baijnath brought the present suit against Musammat Phundo and Bhika Mal, in which he claimed a declaration that the property belonged to Bhika Mal, and was liable to attachment and sale in execution of his decree.

The Court of first instance (Subordinate Judge of Agra) held that the suit was barred by the provisions of s. 244 of the Civil Procedure Code, and dismissed it.

The representatives of Baijnath, who had died, preferred this appeal.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellants.

Mr. *Dwarka Nath Banerji* and Babu *Jogindro Nath Chaudhri*, for the respondents.

EDGE, C.J.—In this action the plaintiff claims a declaration that the property alleged by Musammat Phundo to be her own property is liable to attachment and sale under a decree obtained by the plaintiff in a previous action. In the previous action the plaintiff sued one Bhika Mal on a hypothecation bond, claiming, among other things, enforcement of lien by sale. Musammat Phundo was made a party to that action as a defendant because she

claimed the hypothecated property. The main issue in that action was whether the hypothecated property was Bhika Mal's. The decree in that action was against Bhika Mal personally and for sale of the property hypothecated. In that action a decree was given against Bhika Mal personally, and Musammat Phundo was interested simply and solely in respect of her claim to the hypothecated property, and she was made a defendant solely to prevent her disputing the plaintiff's right to sell the property. The hypothecated property was sold under the decree in that action, and thereupon the plaintiff proceeded to attach and sell the property involved in this action, alleging that the property was the property of Bhika Mal. The property in question formed no part of the hypothecated property affected by the first decree. Musammat Phundo objected in the execution department. Her objection was allowed, and the property was released from attachment. On that the present action was brought. The Court below dismissed the claim on the ground that s. 244, Civil Procedure Code, applied.

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It is argued before us on behalf of the respondent that, as Musammat Phundo was a party to the previous suit, the question here was one which arose between the parties to the suit in which the decree was passed, and related to the execution or satisfaction of the decree, within the meaning of s. 244, Civil Procedure Code. Now that decree, as I have said, affected Musammat Phundo or any interest of hers only so far as it negatived her alleged interest in the hypothecated property. In that action no claim was made against her personally or in a representative capacity. The only claim, so far as she was concerned, was what amounted to a claim for a declaration that she was not entitled to the hypothecated property.

I am consequently of opinion that so far as the decree was sought to be enforced against property other than the hypothecated property, Musammat Phundo was a stranger to the action, and her objection is to be looked at as having been decided under ss. 278 and 280, Civil Procedure Code. The present action was therefore rightly brought under s. 283, Civil Procedure Code.

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I think the decision in *Kameshwar Pershad v. Ram Bahadur Singh* (1) is based on a correct view of the law and supports the view which I take. The case cited by the respondent, *Mulmantri v. Ashfaq Ahmad* (2), and the case of *Nimba Harishet v. Sitaram Paraji* (3) are clearly distinguishable.

The appeal will be allowed, and the case will come on at a later date. All the records of which Mr. Chaudhri and Pandit Sunder Lal will give lists to the office will be sent for.

TYRRELL, J.—I concur with the view expressed by the learned Chief Justice. It appears to me that the Court below has taken an erroneous view of the import of the plaintiff's pleadings in the former case. It is true that in that case the plaintiff said: "As the defendant No. 2 now declares herself proprietor of the whole property, she has also been impleaded, although she has no right to the property, and defendant No. 1 is the owner of the property and of the share of Dwarka Das, because he was his own brother, and was also adopted by him, and he is a proprietor by right of inheritance." These words, no doubt, seem to refer to the whole of the property of the firm of Dwarka Das Bhika Mal, but it is obvious, on a closer inquiry, that the plaintiff's meaning was that Musammat Phundo's pretensions were such as to raise a question of right on her part in hypothecated property which was the sole subject of that suit, and therefore that she was interested in the issue to be raised in respect of that hypothecated property and it only.

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When the appeal came on again for hearing, the Court (EDGE, C.J. and TYRRELL, J.) remanded the case for re-trial.

*Cause remanded.*

(1) I. L. R., 12 Calc., 458.

(2) I. L. R., 9 All., 605.

(3) I. L. R., 9 Bom., 458.

## APPELLATE CRIMINAL.

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November 23.*Before Mr. Justice Straight.*

QUEEN-EMPRESS v. GANGA CHARAN.

*Accomplice—Tender of pardon, effect of—Subsequent trial of accomplice for connected offences—Criminal Procedure Code, ss. 337, 339.*

A prisoner charged before a Magistrate at Benares with offences punishable under ss. 471, 472 and 474 of the Penal Code, made a confession to the Magistrate in respect of those offences. He was then sent in custody to Calcutta, and was there, together with other persons, charged before a Magistrate with offences punishable under ss. 467, 473 and 475. The conduct to which these charges related was closely connected and mixed up with that to which the charges first-mentioned had reference. Under s. 337 of the Criminal Procedure Code, the Magistrate at Calcutta tendered a pardon to the prisoner upon the conditions specified in that section, and the prisoner accepted the pardon, and gave evidence for the prosecution. The Magistrate held that this evidence was not sufficiently corroborated, and accordingly discharged all the accused, but the pardon was not withdrawn, and there was nothing to show that the Magistrate was dissatisfied with the prisoner's statements or considered that he had not complied with the conditions on which the pardon was tendered. Subsequently the prisoner was committed by the Magistrate of Benares for trial before the Court of Sessions upon the charges under ss. 471, 472 and 474 of the Penal Code. He pleaded not guilty, but did not in terms plead the pardon as a bar to the trial, though he made some reference to the subject; and the Sessions Judge having made a brief inquiry as to the proceedings at Calcutta, came to the conclusion that there was no sufficient proof of any conditional pardon, and convicted and sentenced the accused.

*Held* that by the terms of the conditional pardon granted to the accused by the Calcutta Magistrate, the conditions of which were satisfied as was shown by its never having been withdrawn, the accused was protected from trial at Benares in respect of the offences under ss. 471, 472 and 474, and was not liable to be proceeded against in respect of them, and that the trial and conviction were therefore illegal.

Although s. 337 of the Criminal Procedure Code does not in terms cover a case where a Magistrate holding a preliminary inquiry for committal against several persons tenders a conditional pardon to one of them, examines him as a witness, and subsequently discharges all the accused for want of a *prima facie* case against them, the words "every person accepting a tender under this section shall be examined as a witness in the case" mean that for all purposes (subject to failure to satisfy the conditions of the pardon as provided for by s. 339) such a person ceases to be triable for the offence or offences under inquiry or (with reference to s. 339) for "any other offence of which he appears to have been guilty in connection with the same

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matter," while making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences" directly under inquiry. The words last quoted refer to the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence which may be capable of corroboration. The question of how far the pardon protects him, and what portion of it should not protect him, ought not to be treated in a narrow spirit.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. Dwarka Nath Banerji and Babu Jogindro Nath Chaudhri, for the appellant.

The Public Prosecutor (Mr. G. E. A. Ross) for the Crown.

STRAIGHT, J.—The facts material to the determination of the main question raised by this appeal are as follows:—On the night of the 29th January last the appellant was arrested at Benares for uttering some forged five-rupee currency notes to a tradesman in the *chawk* at Benares, and immediately after the house at which he was stopping in Bengali Tolah in that city was searched, and two tin boxes were found, in one of which were seven hundred unnumbered counterfeit currency notes of Rs. 5 each, and one separate numbered note for a like amount, as also six dies marked with numbers for stamping. On the same day the appellant was taken before Mr. Adams, the District Magistrate, to whom he made the following statement:—"These notes (Rs. 5—R. 74-80909, March 1884, and the others without numbers) were found in my possession in my box, which was in my house, which I rented in Bengali Tolah. This note for Rs. 5 (M. R. 74-80915) was given by me last night to a *Basax* in the Dalka Mandavi. These three notes (80302, 80926, 80929) were given by me to Fazlu, shopkeeper of Char Mihman, yesterday night in payment for a time-piece, a pair of socks, a bottle of scent, and two pocket-knives. I got Rs. 2 or Rs. 2-8 (I forget which) cash in change. The six types produced were found with the notes in the box in my house. I and others made the plates for these notes and printed them. I engraved the plates, being a seal engraver by trade. I made the several plates at my home in

Andul. The notes were printed by Mahandar Nath Bhattacharji of Andul. They were printed in his house by him and by his son Suresh Chandar, and Kali Kumar Pal, and myself. Suresh Chandar and his *Bahnoi*, also named Suresh Chandar, got the Press from Calcutta from Tantania, Cornwallis Street, Calcutta. They paid Rs. 125 I think for it. Suresh Chandar, son of Mahandar Nath, and I bought the copper plates in Calcutta in Bara Bazaar. Mahandar Nath paid me Rs. 20 a month to do the work with the condition that he and I were each to have half the notes made. Kali Kumar Pal gave some money to Mahandar Nath for the expenses of the Press. We printed 1,300 or 1,400 notes for Rs. 5 each. Mahandar Nath's son-in-law, Suresh Chandar, without letting us know, passed some of the notes in Andul—passed some twenty or thirty or so, and the matter was blown upon and the police came from Howrah or Calcutta. Then Mahandar Nath said we would print no more there, but would do so in Calcutta. He took possession of the notes and the plates, and would give me nothing. I said I would inform if he gave me nothing. Then he gave me a thousand notes, or it may have been less. He gave me notes without number like these produced. I made the types produced myself; they are not good ones. The good ones were kept by Mahandar Nath. It is a year since we began this work; I have not made any others. I and Suresh Chandar (son of Mahandar Nath) bought the paper at a shop in Ohina Bazaar, which I can point out. I heard that two men were convicted in the High Court at Calcutta of forging ten-rupee notes, and sentenced to ten or twelve years' imprisonment. We made five-rupee notes because Mahandar Nath said it was easy to pass them. He gave me the notes last *Katik*, and I left Andul only last Wednesday. I was afraid to pass them before. I did not pass any of the notes except at Benares. I have passed some twenty or thirty of the notes since I arrived here on Friday. I did not go to Magh Mela at Allahabad. This note produced (R. 74-80505), sent from Allahabad by the police, looks like one of our printing, but I cannot say for certain. Mahandar Nath Bhattacharji is of fairish complexion (wheat colour), about forty

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or forty-five years of age, of average height and middling figure, with moustache but not beard. Suresh Chandar, his son, is above twenty or twenty-two years of age, of the same complexion, about my height, five feet five inches or five feet six inches, middling figure, wears a small beard, but he may have shaved it. Suresh Chandar, his son-in-law, is fair (*gore rung*), age about twenty-nine or thirty, without a beard, and of average height and thin figure, wears a moustache. Kali Kumar Pal is of the complexion of Mahandar Nath, age about forty years, shorter than I am, middling figure, with a moustache only. When I left Andul I had not seen Mahandar Nath and the others for about ten or twelve days. The engraving tools were thrown into the Ganges. The engraving of the plates was delayed by my illness, which made Mahandar Nath angry. The silver anklets produced are mine. I bought them in Benares in the *Chauk* yesterday or the day before. I paid for them with some of my notes and Rs. 25 cash. The cash produced, Rs. 74-12, I brought part from Calcutta and part is change received here for notes. I learnt the trade of seal engraving ten or twelve years ago, but never before forged notes. Mahandar Nath's son, Suresh Chandar, came to me and said:—"You are poor, if you do this we shall all get rich."

This confession was certified according to law by Mr. Adams, and on the same date he passed the following order:—"The accused Ganga Charan Chatterji is charged with an offence under ss. 465, 467 and 468, Indian Penal Code, and also 417, Indian Penal Code. He is also liable under s. 472, Indian Penal Code. Information will be given to the Calcutta Police, but in the meantime he may be put on his trial here for cheating, s. 417, Indian Penal Code. Case made over to Mr. McLean, Joint-Magistrate." Information was, as directed, sent to the Calcutta Police, and on the 3rd of February, Mahandar Nath Bhattacharji and Surendro Nath Bhattacharji, and on a subsequent date, Suresh Chandar Mukerji and Kali Kumar Pal, were arrested by them. On the 12th of February the appellant was sent to Calcutta in charge of the Police Sub-Inspector, arriving there on the 13th. On the 17th of February the four persons I have mentioned above, along with the

appellant, were brought before a Calcutta Magistrate upon charges under ss. 467, 473 and 475, Indian Penal Code, and upon the same date the Inspector of Police conducting the prosecution filed the following application :—

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“To the Magistrate of Howrah—Empress *versus* Mahandar Nath Bhattacharji and others; charge under ss. 467, 473 and 475, Indian Penal Code. As there is no sufficient evidence obtained in the case to warrant the conviction of the four accused persons named, I, under instructions on behalf of Government, pray that accused Ganga Charan Chatterji be offered a pardon and made Queen’s evidence. I have &c. (Signed) Ram Krishto Rai, Inspector of Police.” Thereupon the Magistrate made the following order :—

“Whereas it has been brought to my notice that in this case there is no sufficient evidence to proceed with the case of Empress *versus* Mahandar Nath Bhattacharji, Surendra Nath Bhattacharjs, Suresh Chandra Mukherji, and Kali Kumar Pal, under ss. 467, 473 and 475, unless the evidence of Ganga Charan Chatterji, an accused in dock, is recorded. As the offences under all these sections are triable exclusively by the Court of Session, I direct, under the power vested in me by s. 337, Criminal Procedure Code, a pardon to the said Ganga Charan Chatterji, on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences committed under ss. 467, 473 and 475, Indian Penal Code, and to every other person concerned, whether as principal or abettor in the commission thereof. Signed C. N. Banerji, First Class Magistrate.—The 17th February 1888.

“Read and explained to Ganga Charan Chatterji, who accepts the pardon on the condition stated in the above order. It has been further explained to him that, unless he makes a full and true disclosure, the pardon is liable to be withdrawn and will be withdrawn.”

This was also signed by the Magistrate and by the appellant. Upon the same day the appellant, having been removed from the dock, was placed in the witness-box as a witness for the prosecu-



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tion, and he made a long and detailed deposition, fully disclosing the parts he and the four accused had played in purchasing the implements and materials with which to forge the notes; in forging them and in disposing of them, and in the latter connection he said:—"A portion of these forged notes I took to Benares, but they were without numbers. I put on the numbers on those notes at Benares the very night I reached there. I put the numbers with my own hands. I passed four notes the day following, buying a silver necklet. This was in part payment. After passing sixteen notes I was arrested through the instrumentality of a shop-keeper where I had gone to purchase four gold mohurs. I did the engraving during the day. The notes would be printed at times in the day and at dead of night, and at times about 2 a.m. The notes were given by Mahandar Nath accused. I had threatened to disclose the matter if I were not paid my share for labour." There is nothing whatever to show that the Magistrate was dissatisfied with the statements made by the appellant, or considered that he had not complied "with the conditions on which the tender was made;" on the contrary I must take it, in the absence of any withdrawal of the pardon, that it remained, and remains, in full force and effect for what it is worth. On the 9th March the Calcutta Magistrate, holding there was no sufficient corroboration of the evidence given by the appellant, discharged the four accused before him. Meanwhile proceedings had been carried on, commencing on the 21st February, against the appellant in the Court of the Joint-Magistrate at Benares for offences under section 420, 474, 472 and 471, Indian Penal Code, and on the 10th March he was committed to take his trial before the Court of Session. He was then put on his trial on the 4th April and pleaded not guilty, being defended by a pleader, and in passing it must be noted that at the outset of the proceedings no plea in bar of the trial was raised on the ground of the pardon given by the Calcutta Magistrate. At the close of the evidence for the prosecution, however, the appellant did say: "I was examined at Howrah. There was a Bengali Magistrate. He read over something from a paper. He said as a witness for the Queen. I don't remember any more."

"Q.—Did the Magistrate make any promise to you?

"A.—The police said they would get me off. The Magistrate did not.

The learned Judge then recalled the Police Sub-Inspector, Ganesh Prasad, and he stated: "I took the prisoner to Howrah. He was produced before the Deputy Magistrate there and I heard that he was given the oath, and that his deposition was taken. I was not in the Court when his examination was begun, but was towards its close. The Magistrate, when his examination was close, simply told me to take him away. I first took him before the Superintendent of Police of Howrah. The Superintendent took him before the Deputy Magistrate. The case was not finished. I took the prisoner away from Howrah, and I do not know what has been the result." Upon this matter the learned Judge remarks: "From what was mentioned orally in Court I thought it better to make a brief enquiry as to what happened when the prisoner was taken in police charge to Howrah. I see no sufficient reason for holding or reasonably suspecting that he was given a conditional pardon there." In the result the appellant was convicted under ss. 474, 472 and 471, Indian Penal Code, and sentenced to two years' rigorous imprisonment under s. 474; one year under s. 472, and five years under s. 471.

He now appeals to this Court, and the main, and indeed the only, ground seriously urged on his behalf is that "as he had previously received a full and complete pardon as an approver, the present trial and the sentence passed are illegal." When the case came before me on the 4th of August I directed the Registrar to apply to the Calcutta High Court to sanction the record of the Howrah Magistrate being sent to this Court, and such sanction was at once granted, and I have had an opportunity of perusing the whole of his proceedings. It is true that the charges on which the appellant with the four accused was brought before the Magistrate were for forgery of valuable securities under s. 467; under s. 473 for making, counterfeiting, and having in possession plates and instruments, intending to use the same for purposes of a

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forgery which would be punishable under s. 467, and for counterfeiting a device or mark within the meaning of s. 475; and that that there were no charges preferred under ss. 474, 472, 471 and 420 for which offences the appellant was subsequently tried at Benares. It is equally true that the evidence on which the appellant was convicted related to distinct individual possession by him of implements of forgery and of forged notes with knowledge and intent, and of specific utterings with knowledge and intent, at Benares. But it is impossible not to say that his conduct there was more or less mixed up and concerned with the conspiracy at Calcutta of which he made disclosure as a witness, and the passage from his evidence I have already quoted, as to what he had done at Benares, was a material portion of a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences then under enquiry. Though approvers may be infamous persons, they are nevertheless entitled to have faith kept with them by the Courts, and in dealing with the question as to what a pardon is to cover, and how far it is to extend, I should not be inclined to apply too technical tests, and should rather look to substance than mere matters of form. I have no hesitation whatever in holding that the pardon granted by the Calcutta Magistrate on the 17th February to the appellant, on condition of his making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences under ss. 467, 473 and 475, Indian Penal Code," was accepted by the appellant on such condition as his signature at its foot shows, that he subsequently gave his evidence in consequence of such pardon, and that whatever its force of operation may be it has never been withdrawn. Looking to the special facts of this case, it does not appear to me that the circumstance that the appellant had made a complaint to Mr. Adams on the 29th January, or that the pardon was tendered him by another Court in another Province with a different territorial jurisdiction, should affect the decision of the point before me. As to this latter matter, I think the case must be looked at in exactly the same light as it would have had to be regarded had the appellant and the four other persons been before the Joint-Magistrate at

Benares charged with offences within his jurisdiction under ss. 467, 473 and 475, and there being a charge against the appellant alone of uttering under s. 471. Could it be seriously pretended for a moment that if the Joint-Magistrate of Benares had tendered a pardon in the same terms as those contained in the Calcutta Magistrate's order of the 17th February, and the appellant had given the same evidence before him as he did at Calcutta, such pardon would not have protected him? I hold that it would, and I am fortified in this view by what appears in s. 339, Criminal Procedure Code, as to the consequences that follow on a non-compliance by an approver with the conditions of his pardon and its withdrawal. He may be tried for the offence in respect of which the pardon was tendered, or for any other offence of which he appears to have been guilty in connection with the same matter. So that while on the one hand the condition is "a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence," on the other a non-compliance with it leaves him open to trial for the offence in respect of which the pardon was tendered, or any other offence in connection with the same matter. It must be borne in mind that in countenancing these pardons to accomplices the law does not invite a cramped and constrained statement by the approver: on the contrary it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences as to which he gives evidence, and when he has given his evidence, I do not think that the question of how far it is to protect him, and what portion of it should not protect him, ought to be treated in a narrow spirit. In a note by Mr. Greaves to the 4th edition of Russell on Crimes, vol. III, p. 597, it is said: "If, however, the prisoner, having been admitted as an accomplice to one felony, be thereby induced to suppose that he has freed himself from the consequences of another felony, the Judge will recommend the indictment for such other felony to be abandoned. Where an accomplice made a disclosure of property which was the subject-matter of a different robbery by the same parties, under the impression that by the information he had given previously as to the robbery of other property he had delivered himself from the conse-

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quences of having the property he so disclosed in his possession, Coleridge, J., recommended the counsel for the prosecution not to proceed against the accomplice for feloniously receiving such property :'' *Garside's case*, 2 Lew. 18. I quote this passage as illustrative only of the principles upon which a learned Judge has acted in such matter in England. The first question which it appears to me I have to ask myself is, looking to the offences under inquiry before the Calcutta Magistrate, should the pardon granted to the appellant be held to extend beyond these special offences, and to exempt him from punishment for the offences charged against him at Benares? I have read the evidence given by the appellant at Calcutta, and as the Magistrate nowhere upon this record indicates that he withdrew the pardon, I think I am bound to assume, as I have already said, that he believed the appellant had made a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences under inquiry, and so satisfied the conditions of the tender. It was suggested by the learned Public Prosecutor that the fact that the appellant had already made a confession to the Magistrate of Benares destroys the effect of his subsequent evidence at Calcutta. I do not think so any more than I should have thought so had he simply made his statement to a police officer and the information contained therein had been forwarded to Calcutta and had led, as his confession to the Magistrate did, to the arrest of the persons implicated and to his being examined as a witness. Upon what appears to me a reasonable construction of the terms of the pardon tendered by the Calcutta Magistrate, I think that, looking to the particular facts of this particular case, and in no way laying down any rule to govern other cases, it ought to protect the appellant from punishment for the offences under ss. 471, 472 and 474. It is obvious to my mind that almost from the moment of his arrest it was contemplated by the police, and most properly, to make him the instrument of bringing the other conspirators to justice. The application of the Calcutta Inspector of the 17th February shows this, and I have no doubt that when the appellant gave his evidence at Calcutta as to his own proceedings at Benares, he did so in the belief that as to his whole con-

nection with the conspiracy he would be exempted. Then arises the question as to in what way the pardon granted by the Calcutta Magistrate should have been given effect to, so far as the trial in the Benares Sessions Court was concerned. Could it be pleaded as a legal plea in bar like "*auterfois convict*" or "*auterfois acquit*"? I confess I am placed in somewhat of a difficulty to answer that question from the absence from the Criminal Procedure Code of any specific directions on the subject. Primarily the power of pardon rests in the Sovereign, and the provisions of s. 417, Criminal Procedure Code, authorising the Governor-General in Council or a local Government to suspend the execution, or remit the whole or part of any sentence passed upon any person sentenced to punishment, in no way interfere with the prerogative of the Crown in that respect. The special authority therein conferred, however, relates to persons sentenced to punishment and does not touch cases under s. 337 of the Criminal Procedure Code, in which a person charged along with others with a crime has, under a conditionally tendered pardon, given evidence against such persons and satisfied the conditions precedent upon which it was tendered. I must, therefore, look to that section, and, as far as it throws light on the matter, to s. 339, to see what effect a pardon so tendered is to have. Taking s. 337 it is clear that it does not in terms cover a case in which a Magistrate holding a preliminary inquiry for committal against several persons tenders a conditional pardon to one of them, examines him as a witness, and subsequently discharges all the accused for want of a *prima facie* case to justify committal. But it appears to me that the words "every person accepting a tender under this section shall be examined as a witness in the case" mean that for all purposes, subject of course to his failure to satisfy the conditions of his pardon as provided for by s. 339, he ceases to be triable for the offence or offences under inquiry, or, looking again to s. 339, for "any other offence of which he appears to have been guilty in connection with the same matter while making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences," directly under inquiry. It is clear to my mind, there-

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fore, that, at least, as to the charges under ss. 467, 473 and 475, Indian Penal Code, upon which the appellant was brought up with the other four persons before the Calcutta Magistrate, he ceased to be an accused and became a witness, and that such pardon never having been withdrawn, it could have been pleaded in bar to further proceedings against him had they been subsequently instituted under those sections before the Calcutta Magistrate. It remains then to see whether the pardon stood good for the same purposes as to the offences under ss 474, 472 and 471, that is to say, (1) for being in possession of the forged notes, knowing them to be forged and with intent that they should be used as genuine; (2) being in possession of instruments of forging notes with intention to use them, punishable under s. 467, only a more aggravated form of the offence with which he was charged at Calcutta under s. 473; and (3) uttering forged notes to the various persons at Benares. I have already said that in dealing with this point the terms of the pardon must be looked at in connection with the special facts of the particular case. The condition precedent imposed by the Calcutta Magistrate and accepted by the appellant was that he should make "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences under ss. 467, 473 and 475;" in other words, that he should make a clean breast of his whole connection with the conspiracy to forge currency notes, in which he alleged the other four persons to have been concerned with him. I need not point out the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence, which may be capable of corroboration, and this is what I understand the Criminal Procedure Code to mean, when it speaks of a "full and true disclosure of the whole of the circumstances within his knowledge." It is true that the appellant did not in terms plead this pardon in the Court of Sessions as a bar to his trial there, but contented himself with a plea of not guilty to the charges, though he did say something about it towards the end of the proceedings. The case, however, is before me in appeal, and I think, seeing that there are no specific directions in the Code of Criminal Procedure as to how such matters are to be

pleaded and what are to be the consequences of not specifically pleading them, that if I hold the appellant protected by the pardon given him, I ought to give him the benefit of it, as no doubt the learned Judge would have done had he had the materials before him that I have, just as much as if I were now satisfied that the appellant had been formerly acquitted or convicted of the offences of which he has now been convicted, I should feel bound to give effect to such a plea in appeal. To sum up the matter, having before me the additional evidence contained in the Calcutta record, I am of opinion that, by the terms of the conditional pardon granted to the appellant, on the 17th February, the conditions of which were satisfied by him, as is shown by its never having been withdrawn, he was protected from trial at Benares in respect of the offences under ss. 474, 472 and 471 of the Penal Code, and was not liable to be proceeded against in respect of them. I therefore hold such trial to have been illegal, and accordingly I reverse the findings and sentences of the learned Judge, and quashing all the proceedings of the Sessions Court, discharge the appellant and direct that he be released.

*Conviction quashed.*

### FULL BENCH.

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*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Tyrrell.*

**MUHAMMAD SADIK AND OTHERS (DEFENDANTS), v. MUHAMMAD JAN AND OTHERS (PLAINTIFFS).**

*Dismissal of suit for insufficient court-fee on plaint—Decree—Appeal—Civil Procedure Code, ss. 2, 54, 158—Act VII of 1870 (Court Fees Act), s. 12.*

The Court of first instance being of opinion that the plaint bore an insufficient court-fee, and the plaintiff not making good the deficiency, dismissed the suit after recording evidence, but without entering into the merits. On appeal the lower Appellate Court held that the court-fee was sufficient, and remanded the case for trial on the merits.

*Held* that s. 158 of the Civil Procedure Code was not applicable to the case; that the first Court's disposal of the suit must be treated as being under s. 54, and was therefore a decree within the meaning of s. 2 and appealable as such, and that such



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appeal was not prohibited by s. 13 of the Court Fees Act. *Ajoodhya Pershad v. Guaga Pershad* (1) and *annamalai Chetti v. Cloete* (2) referred to.

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THIS was a reference to the Full Bench by Edge, C.J., and Tyrell, J.

The facts are sufficiently stated in the judgment of the Full Bench.

Mr. *Hamidullah* for the appellants.

Mr. *Dwarka Nath Banerji* for the respondents.

EDGE, C.J., STRAIGHT, and TYRELL, JJ.—This was a suit for redemption of mortgage. The mortgagor had assigned. The mortgagee and the assignee were the defendants. The Munsif decided that the fee payable on the plaint was insufficient, being of opinion that the relief sought by the plaintiff must include a further relief against the assignee by a declaration that the assignment was bad. The Munsif consequently held that the relief sought in the plaint was under-valued. He dismissed the suit without entering into the merits, on the ground that the plaintiff did not then and there make good the fee which he, the Munsif, had determined to be payable. The plaintiff appealed, and on appeal the Subordinate Judge, holding that the fee paid by the plaintiff was more than sufficient and that no cancellation of the deed of assignment was sought, allowed the appeal and remanded the case for trial on the merits. From that order this appeal has been brought. If the relief sought was, in fact, under-valued, it was the duty of the Munsif to reject the plaint. He, in fact, recorded evidence, and having recorded evidence he dismissed the suit without expressing any opinion on that evidence. It is obvious that if he was right as to the fee, the only proceeding open to him was to reject the plaint under s. 54 of the Code of Civil Procedure on failure of the plaintiff within a reasonable time to make good the deficiency. We are not prepared to hold that s. 158 was applicable to a case of this kind, when there is a plain direction in s. 54 as to the course a Court must adopt. We must regard the Munsif's disposal of the suit as being under s. 54. If that be a correct view, his order rejecting the plaint

(1) I. L. R., 6 Cal., 249.

(2) I. L. R., 4 Mad., 204.

was a decree under s. 2 of the Code. An order rejecting a plaint is in terms included in the definition in s. 2, and being a decree was appealable when there was no statutory prohibition to the contrary. The next question is, is there such statutory prohibition? On behalf of the appellants, s. 12 of the Court-fees Act is said to be a direct prohibition against an appeal in this matter. If that argument is to be accepted, there would be no appeal when a Judge of first instance wrongly decided that a suit was under-valued, and on that decision rejected the plaint. In our opinion the intention of the framers of the Code of Civil Procedure was that there should be an appeal in every case falling within s. 54; otherwise we should have found in the definition of decrees in s. 2 words limiting those orders under s. 54 which might, for the purpose of the Code, be considered decrees. A similar view was taken in the case of *Ajoodhya Pershad v. Gunga Pershad* (1). We are of opinion that the decree of the Munsif should be regarded as passed in rejection of the plaint and was appealable. Several cases have been referred to. In *Annamalai Chetti v. Cloete* (2) the learned Judges endeavoured to reconcile s. 54 of the Code of Civil Procedure with s. 12 of the Court-fees Act. We do not think it necessary to consider whether those sections can or cannot be reconciled, as we are of opinion that an appeal lies under the Code of Civil Procedure of 1882. If we had to consider whether those sections could be reconciled or not, on the lines on which those Judges proceeded, we should have a great difficulty in coming to the conclusion that a Court could determine the amount without deciding the question as to the relief sought, and yet that the relief sought was not a question relating to the valuation for the determination of the fee chargeable. The Subordinate Judge may have been wrong in remanding the case under s. 562, as the evidence had been recorded. The Subordinate Judge ought to have treated the decree of the Munsif as an order rejecting the plaint. The Munsif should have been told to accept the plaint as properly stamped and to proceed to dispose of the case on the merits. To that extent we allow the appeal and direct the Munsif to restore the suit to its place in the list of pending cases on the basis of its being

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 according to law. Costs here and hitherto to abide the result.  
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 August 1. *Cause remanded.*

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.*

KESHABDEO (PETITIONER) v. RADHE PRASAD (OPPOSITE PARTY).

*Execution of decrees—Civil Procedure Code, ss. 311, 313 320, 322B, 322C, 322D—  
 Transfer of execution to Collector—Application to Civil Court to set aside  
 sale held by Collector on the ground of irregularity.*

*Held*, by the Full Bench that an application to set aside, on the ground of material irregularity within the meaning of s. 311 of the Civil Procedure Code, a sale held by the Collector, in execution of a decree transferred to him for execution under s. 320, cannot be entertained by a Civil Court. *Madho Prasad v. Hense Kuar* (1) followed. *Natko Mal v. Lachmi Narain* (2) distinguished.

*Per EDGE, C.J.*—The intention of the Legislature as expressed in s. 320 and the following sections of the Civil Procedure Code was not to allow any delegation to the Collector of power to adjudicate upon questions of title, but, in other matters, to hand over all the proceedings to the Collector, and to withdraw the matters so handed over from the purview of the Civil Courts to that extent, but not questions of title or the other questions, if in dispute, referred to in ss. 322B, 322C, or 322D.

THIS was a reference to the Full Bench of an appeal which originally came for hearing before Brodhurst and Mahmood, JJ. The facts are sufficiently stated in the judgments of Edge, C.J., and Straight, J.

Pandit *Sunder Lal* for the appellant.

Munshi *Kashi Prasad* for the respondent.

EDGE, C.J.—In this case the respondent in the appeal before us obtained a money-decree against the appellant. The decree was transferred to the Collector for execution under the rules framed by the local Government under s. 320 of the Code of Civil Procedure. After the sale by the Collector, the judgment-debtor (appellant) applied to the Munsif to set aside the sale, on the ground of there having been irregularity in the conduct of the sale. The Munsif dismissed the application, on the ground that he had no jurisdiction.

(1) I. L. R., 5 All., 314.

(2) I. L. R., 9 All., 43.

I assume for the purpose of this judgment, but not otherwise, that the irregularity complained of was an irregularity within the meaning of s. 311 of the Code of Civil Procedure. The judgment-debtor from the order of the Munsif brought this appeal. I have not the slightest doubt that the case is governed by the decision of the Full Bench of this Court in *Madho Prasad v. Hansa Kuar* (1). The case has come up from the Division Bench to the Full Bench, it having been contended that the judgment delivered by me and concurred in by Mr. Justice Oldfield in *Nathu Mal v. Lachmi Narain* (2) decided in contravention of the decision of the Full Bench that an application of this kind lay to the Civil Court. The case of *Nathu Mal v. Lachmi Narain* (2) was a case in which the Collector in executing a decree transferred to him had sold the property, and the purchaser had come to the Civil Court to set aside the sale under s. 313, on the ground that there was no saleable interest of the judgment-debtor in the property sold. In that case, for the reasons which I therein gave, I came to the conclusion that the application was properly made in the Civil Court and was entertainable by the Civil Court. I do not see that that decision, in any way, contravenes the judgment of the Full Bench to which I have referred. In the Full Bench case the question before the Court was whether an application to set aside a sale on the ground of irregularity, when the sale had been conducted by the Collector, would, under ss. 311 and 312, lie to the Civil Court or would lie to the Collector. When I say so I thoroughly agree with the view of the Full Bench that the object of transferring the execution of that class of decrees which fall within s. 320 of the Code to the Collector is to give him, speaking generally, a free hand to deal with the property in the best interests of the parties concerned. In the Full Bench case the point in *Nathu Mal v. Lachmi Narain* (2) was not before the Court, and the question did not arise in the case that there might be a distinction between the power of the Collector in the carrying out of a decree transferred to him subject to the limits imposed upon him by the Code itself, and a power to decide upon a question of title or a question as to whether the decree should be executed at all. As I

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(1) I. L. R., 5 All., 814.

(2) I. L. R., 9 All., 43.

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take it, the Collector, when a decree is transferred to him, is bound to carry out the decree subject to the discretion given to him by s. 321 and the following sections and subject to the provisions contained in ss. 322B, 322C, and 322D. But I find in those sections no power given to the Collector and nothing which would suggest the giving of a power to the Collector to decide that the property which was directed by the decree to be sold was not the property of the judgment-debtor mentioned in the decree. When such a question arises before a sale, s. 322B shows that it is for the Civil Court and not for the Collector to decide it. The Civil Court under s. 313, which passed its own decree, it appears to me would be the tribunal to say what shall take place when property directed by it to be sold has been sold, and it subsequently appears that it was not the property of the judgment-debtor. If the Collector exercised the powers undoubtedly given to the Civil Court under s. 313 in cases of sales conducted by the Civil Court, the Collector would, if he set the sale aside, on the ground that the judgment-debtor had no saleable interest in the property which he was directed to sell, have, in fact, declined to carry out the decree of the Civil Court and would have decided on a question of title which, if it had arisen before the sale, he was bound to refer to the Civil Court. Then what is he to do? If he set aside the sale on the ground that the judgment-debtor had no interest in the property which was directed by the decree of the Civil Court to be sold, is the Collector to re-sell the property to some one else when no better title can be made, or is he to decline to give any effect to the decree? In the latter event he would be absolutely interfering with the decree of the Civil Court. Now the sections of the Civil Procedure Code from 321 forwards undoubtedly give the Collector, subject to ss. 322B, 322C and 322D, a discretion as to what he may do where a decree is transferred to him for execution, but there is nothing in those sections to suggest that the Collector need do nothing to give effect to the decree. So far as I am aware, there have been no regulations framed by the local Government which would give the Collector power to set aside a sale on the ground that there was no title. I do not think that what was the intention of the Legislature when a statute was passed can be

gathered from subsequent legislation, unless by the subsequent legislation that intention is specifically declared. Nevertheless I may observe that s. 30 of the Civil Procedure Code Amendment Act (VII of 1888), although it authorises expressly rules to be made under s. 820, giving the Collector power to exercise the powers of a Civil Court under s. 312, makes no suggestion that any rules may be framed giving him power to decide questions arising under s. 313, namely, to decide whether the judgment-debtor had or had not title in the property sold. It appears to me that the two classes of cases are totally distinct; that it was not the intention of the Legislature to allow any delegation to the Collector of a power to adjudicate upon title, but that it was the intention of the Legislature in other matters to hand over all the proceedings to the Collector and to withdraw those matters so handed over from the purview of the Civil Court to that extent, but not question of title or the other questions, if in dispute, referred to in ss. 322B, 322C, 322D, if they arose. I have expressed these opinions, because I wish it to be understood that I do not question in any way and did not intend, in the case of *Nathu Mal v. Lachmi Narain* (1), to question the authority or propriety of the decision of the Full Bench in the case of *Madho Prasad v. Hamsa Kuar* (2). Agreeing as I do with the decision of the Full Bench in that case, I must still say that in my opinion the two cases are totally dissimilar and different principles must be applied to them. I am of opinion that the judgment of the Full Bench governs this case; and that the appeal should be dismissed with costs.

STRAIGHT, J.—This is an appeal from an order of the Munsif, dated the 23rd July 1887, by which order he rejected an application made to him by a judgment-debtor to set aside a sale which had been held by a Collector in execution of a Civil Court decree transferred to him under the provisions of s. 820 of the Civil Procedure Code. The ground upon which avoidance of the sale was sought was that there had been an irregularity of the kind mentioned in s. 311 of the Civil Procedure Code. The Munsif held that the decree in execution of which the sale had taken place having been

(1) I. L. R., 9 AL., 48.

(2) I. L. R., 5 AL., 314.

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transferred by him under s. 320, he had no jurisdiction to entertain the application. It is this decision of his which was the subject-matter of the appeal before my brothers Brodhurst and Mahmood, which by their order has been referred to the Full Bench for disposal. The ground of the reference mainly was that according to the opinion of those two learned Judges it was difficult to reconcile the Full Bench ruling of this Court, which is to be found at page 314 of I. L. R., 5, All., and a decision of the learned Chief Justice and Mr. Justice Oldfield, which is to be found at page 43 of I. L. R., 9, All. The course that the discussion has taken and the suggestions that have been thrown out during the argument render it, in my opinion, unnecessary for us to consider whether the view expressed by the learned Chief Justice in the ruling referred to was a correct one or not, or in other words, whether the learned Chief Justice was correct in the view that he took with regard to s. 313 of the Civil Procedure Code. It is enough for the purposes of this case to say that we have not s. 313 before us; if we had, I am not at all prepared to say that there is not great force in the view expressed by the learned Chief Justice in the ruling referred to, and what has been said by him to-day, as to the distinction that is to be drawn between the exceptional class of cases falling under s. 313 and those more directly concerned with proceedings in direct execution of a decree. In passing I may, however, say that under the rules which have been framed by the local Government in accordance with the provisions of s. 320, dated the 20th November 1880, there is no reproduction of the provisions of s. 313, although in all other particulars they have reproduced, for the purpose of guiding the Collector in execution of decrees transferred to him, the provisions of the Civil Procedure Code. It is also noticeable that, in clause 12 of s. 17 of those rules, where reference is made to the setting aside of a sale, the rules say that in the event of the sale being set aside, the Collector may order the refund of the "fee," and this seems to be all the Collector has power to refund. Under Civil Procedure Code, however, upon the setting aside of a sale, the Civil Court has power to order the refund of the purchase-money if it has been paid. The omission in the rules to which I pointed is possibly due to the

circumstance that it is into the Civil Court that the proceeds realized by the sale are to be paid. However, it is not necessary for me to determine whether, in cases under s. 313 of the Civil Procedure Code, I should follow the decision of the learned Chief Justice or should hold a different view. I think it right to say, having been a party to the Full Bench ruling in *Madho Prasad v. Hansa Kuar* (1), that what was intended to be laid down there and what was laid down is that where a decree has been transferred to a Collector for execution, his proceedings in execution were not to be governed by the provisions of the Civil Procedure Code, but they were to be governed and were governed by the rules which were made in that behalf by the local Government; and that, considering the objects of those rules and the procedure of the Collector under those rules, s. 244 of the Civil Procedure Code did not apply, and there was no such appeal as there would be from the ordinary decision of the Civil Court in executing decrees under that section. This is what the Full Bench ruling laid down and that is all it laid down. I agree with the learned Chief Justice that it is a distinct authority for the proposition that when, in the execution of a decree transferred to a Collector for that purpose, an application has to be made to set aside a sale which the Collector has held, the application must be made to him and cannot be made to the Civil Court. This being so, I agree with the learned Chief Justice's order that the appeal must be and it is dismissed with costs.

MAHMOOD, J.—I have arrived at the same conclusion, and being one of the Judges who referred the case to the Full Bench, all I need say is that the Full Bench ruling of this Court in *Madho Prasad v. Hansa Kuar* (1) governs this case, and that I accept the distinction which the learned Chief Justice has drawn between the Full Bench ruling and his Lordship's own ruling in *Nathu Mal v. Lachmi Narain* (2). The exact point raised and decided in that case does not arise in this case. It can scarcely be doubted, and I say this advisedly after having had to deal with the transfer of decrees to the Collector under the provisions of s. 320 and the following sections, that the state of the law, even as represented in the statute,

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(1) I. L. R., 5 All., 314.

(2) I. L. R., 9 All., 43.



1888 is full of complications and difficulties, and that any attempts that  
 KESHABDHO have been made to amend it have scarcely done enough to remove  
 v. those doubts and difficulties. Instead of having proved a benefit  
 RADHE to the judgment-debtor in whose interests those various sections  
 PRASAD. were introduced in the Code of Civil Procedure, they have tended  
 to increase litigation on the one hand, and to prevent the decree-  
 holder from obtaining the fruits of his decree on the other.

*Appeal dismissed.*

## APPELLATE CIVIL.

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 August 9.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.*

BHAGWANT SINGH AND OTHERS (DEFENDANTS) v. KALLU (PLAINTIFF).\*

*Act XXI of 1850—Suit by person born a Muhammadan as reversioner in a  
 Hindu family.*

Act XXI of 1850 does not apply only to a person who has himself or herself renounced his or her religion or been excluded from caste. The latter part of s. 1 protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste. This applies to a case where a person born a Muhammadan, his father having renounced the Hindu religion, claims by right of inheritance under the Hindu law a share in his father's family.

THIS was a suit brought by one Kallu Khan for possession of certain property which had been sold to the defendants by one Musammat Banno, since deceased. The grandfather of the plaintiff, Hari Singh, had three sons, Mohan Singh, Bacha Singh, and Mahipat Khan. Mahipat Khan, who was father of the plaintiff, was converted to Muhammadanism. The property in suit had belonged to Bacha Singh, second son of Hari Singh, and Banno, whose alienation of it was impugned, was Bacha Singh's widow. The plaintiff, who, as well as his father, was a Muhammadan, claimed the property by right of inheritance, under the Hindu law, to Bacha Singh. The

\* Second Appeal No. 205 of 1887 from a decree of Maulvi Mirza Abid Ali Khan, Subordinate Judge of Shahjahanpur, dated the 10th November 1886, confirming a decree of Maulvi Muhammad Abdul Ghafur, Munsif of Tilhar, dated the 2nd September 1886.

defendants pleaded, *inter alia*, that the plaintiff, being a Muhammadan, was not entitled to claim by inheritance any property belonging to Hindu members of the family ; and that Act XXI of 1850 was not applicable to the case, inasmuch as it protected only those persons who had actually changed their religion, and not the children of such persons.

The Court of first instance (Munsif of Tilhar) decreed the claim.

On appeal by the defendants, the Subordinate Judge of Shah-jahanpur affirmed the Munsif's decree. In the course of his judgment he said :—

“ It is contended that Mahipat Khan died before Musammat Banno, widow of Bacha Singh, and consequently the provisions of Act XXI of 1850 do not apply to Mahipat Khan, inasmuch as the plaintiff has not changed his religion, but was born a Mussalman. The Court cannot, however, allow that contention. The provisions of Act XXI of 1850 clearly mean that nobody will be prejudiced in his right of inheritance by a change in his religion. It is not necessary that he himself should have been a convert; it is all the same whether he or his ancestor (father or grandfather) changed their religion.....The result is that inheritance follows descent without reference to religion. As the plaintiff is a descendant of Hari Singh and a relative of Bacha Singh, he cannot be prejudiced by belonging to a different religion, and has the same right as if he and his father were Hindus. Under the Hindu Law the right of the plaintiff's father to inherit from his father or brother was not confined to himself only, but he could transmit it to his children at their birth. Under these circumstances, the children of Mahipat Khan acquired a right on their birth of which they cannot be deprived by a difference in religion. Now there is no male member in the family except Mahipat Khan's sons, and it is therefore clear that they alone can inherit the property as they would have done if there had been no difference of religion. If the transfer were not made by the widow, these persons alone would have inherited the property.”

The defendants appealed to the High Court, upon the ground that the lower Courts had “erred in their interpretation of Act

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XXI of 1850," and that "the plaintiff, being a born Mussalman, cannot claim inheritance of a deceased Hindu."

Munshi *Nawal Behari Bajpai*, for the appellants.

Pandit *Moti Lal Nehru*, for the respondent.

EDGE, C.J.—A Hindu named Hari Singh had three sons, Mohan Singh, Bacha Singh, and Mahipat Singh. Mahipat became a Muhammadan, and the plaintiff in this case is his son. Bacha died childless, leaving two widows surviving him, Kosila and Banno. Kosila and Banno were recorded proprietors of Bacha Singh's share. On the death of Kosila, Banno was recorded as sole proprietrix of the share. Banno sold the property in question to the defendant. Banno has died. The plaintiff claimed the property which was left by Bacha Singh by right of inheritance. The sole question we have to consider in this second appeal is whether the plaintiff, having been born a Muhammadan, can claim as a reversioner to the share of the Hindu family. This in my judgment depends on the construction of Act XXI of 1850. Mr. *Bajpai* for the purchaser, who is appellant here, very ably argued that that Act applies only to a person who has himself or herself renounced his or her religion or been excluded from caste, and that it does not apply to a case like this in which the person claiming by right of inheritance a share in a Hindu family is the son of the person who renounced his religion, and was born a Muhammadan. I was very much struck with the force of Mr. *Bajpai's* argument. It may be, no doubt, inconvenient that a Muhammadan should be introduced into a Hindu family or a Hindu into a Muhammadan family, but this is a matter for which, if it is a grievance, we, who have merely to interpret the law, are not responsible. We can only interpret the law as we find it, without any consideration for the opinions of those persons whom the law may affect. Prior to the passing of Act XXI of 1850 there was in force in the Presidency of the Fort William, Bengal, a Regulation known as Regulation VII of 1832. Speaking broadly, s 9 of that Regulation was passed to relieve Hindus or Muhammadans in that Presidency from any disability with regard to the rights of property under Hindu or Muhammadan law, which might have arisen by

reason of a Hindu or Muhammadan having changed his religion, or by reason of a Hindu being out of caste. Act XXI is a very short Act, and I propose to read the whole of it:—

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“Whereas it is enacted by s. 9 of Regulation VII, 1832, of the Bengal Code, that whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu and the other of the Muhammadan persuasion, or where one or more of the parties to the suit shall not be either of the Muhammadan or Hindu persuasion; the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled, and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the Government of the East India Company, it is enacted as follows:—

“So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company and in the Courts established by Royal Charter within the said territories.”

The first thing to be observed is that the Legislature in the preamble expresses the intention of the Act to be to extend the principle of s. 9 of Regulation VII of 1832 which was then in operation in the provinces subject to the Presidency of Fort William throughout the territories of the East India Company. That being so, one would expect that in the operative part of the Act the principle of s. 9 of Regulation VII of 1832 would not be cut down or curtailed. We have got to see whether Mr. *Bajpai's* argument is correct that the Act did, in fact, cut down and curtail the principle of s. 9. His argument was that notwithstanding the intention of the Legislature shown in the preamble, the relief extended to the rest of the Company's provinces was by the operative

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KALLU. part of the Act limited by the wording of that part to the actual person who might change his religion or be excluded from caste. No one can read s. 9 of Regulation VII without seeing that if Mr. Bajpai's argument is correct the operative portion of the Act, instead of extending the principle to the rest of the Company's provinces, would have limited the relief it was intended to extend. As I read the operative portion of the Act, it relates to different classes of persons. In the earlier portion it protects any person from forfeiture of right of property by reason of his or her renouncing their religion or being excluded from caste. In the case before us those words would have protected the father of the plaintiff, who was the person who renounced his religion, and they protected him from losing any right which he had. The latter portion of the section, in my opinion, protects any person from having any right of inheritance affected by reason of any person having renounced his religion or having been excluded from caste. If the latter part of the section was restricted to the protection of the right of inheritance of the persons renouncing their religion or being excluded from caste, their case was covered by the words of the early part of the section.

Reading the section as I do, and I think it is the natural reading of the section, I give effect to the intention of the Legislature in passing the Act, which we find expressed in the preamble, and to the principle of s. 9 of Regulation VII.

The effect of this construction of the Act is that the appeal is dismissed with costs.

STRAIGHT, J.—I concur.

*Appeal dismissed.*

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August 17.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

DAYA (DEFENDANT) v. PARAM SUKH (PLAINTIFF).\*

*Defamation—Suit by father in his own right for defamation of daughter—Suit not maintainable.*

A suit for defamation of his daughter cannot be maintained by a Hindu father suing in his own right and not as general attorney or on behalf of the daughter. A

\* Second Appeal No. 545 of 1887 from a decree of W. H. Hudson, Esq., District Judge of Farakhabad, dated the 5th January 1887, reversing a decree of Babu Prag Das, Munsif of Kanauj, dated the 23rd September 1886.

suit for defamation can only be brought by the person actually defamed, if the person is *sui juris*, and if not *sui juris*, then under the provisions of the Civil Procedure Code, by his guardian or next friend. *Dawan Singh v. Mahip Singh* (1) and *Parvathi v. Mannar* (2) distinguished. *Subbaiyar v. Kristnaiyar* (3) and *Luckumsey Rowji v. Harbun Nursey* (4) referred to.

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THIS was a suit for damages for defamatory words spoken by one of the defendants in reference to the plaintiff's daughter; and the plaintiff also claimed damages for expenses incurred by him in connection with his daughter's *gauna* ceremony, in reliance upon an agreement between himself and the defendants, and which expenses he alleged had been thrown away in consequence of the defendant's conduct. One of the two defendants was son of the other, and he had been, some years prior to the institution of the suit, married to the plaintiff's daughter. A date was fixed for the celebration of the *gauna* ceremony, and the plaintiff made the necessary preparations for such celebration; but the defendants did not attend. Shortly afterwards the plaintiff went to the defendants to ask for an explanation, and the father then said that the plaintiff's daughter was a person of bad character, and he and his son would take no part in the *gauna*, and would not dine at the plaintiff's house. This statement was alleged to have been made in the presence of several caste-fellows of the plaintiff. The defence to the suit was, *inter alia*, that it could not be maintained by the plaintiff, or any one other than the person defamed.

The Court of first instance (Munsif of Kanauj) dismissed the suit on this ground, referring to *Oodai v. Bhawanee Pershad* (5) and *Subbaiyar v. Kristnaiyar* (3).

On appeal by the plaintiff the District Judge of Farakhabad reversed the first Court's decree and allowed the claim. The Judge observed:—

“I think that the appellant's third and fourth pleas must be admitted. There can be no doubt that the plaintiff suffered defamation of character from the words used by the defendants, and that he is entitled to compensation for it. The case quoted by the lower

(1) I. L. R., 10 All., 425.

(3) I. L. R., 1 Mad., 333.

(2) I. L. R., 8 Mad., 175.

(4) I. L. R., 5 Bom., 580.

(5) 1 Agra, 264.

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Court does not apply, for the position of the parties in the two cases is different. That was a case of a possibly not very closely allied relative suing on behalf of a female presumed to be capable of suing for herself; this is a case of a father suing for injury done to himself by words spoken against his daughter of tender age and under his protection. The rulings also quoted by the appellant's pleader from the reports of the Madras and Bombay High Courts are not applicable to the circumstances of the present case. The injury done to the daughter's reputation in the present instance is undoubtedly a personal injury to the plaintiff himself. In the second place, it does not affect the plaintiff's claim on account of pecuniary loss that no compact is proved to having been made for fixing the date of the *gauna*. It is sufficient that the plaintiff was authorized to presume that the ceremony would be performed at some approaching date, and that he made preparations in anticipation of such performance. The plaintiff's witnesses have given a list of items of expense which verify the plaintiff's estimate of Rs. 200 for cost of entertainment; and his pleader is willing to reduce his claim for damages on other grounds to an equal sum. I therefore reverse the judgment of the lower Court, and give the plaintiff-appellant a decree for Rs. 400 with all costs."

The defendant Daya appealed to the High Court on the ground, *inter alia*, that the plaintiff had shown no cause of action.

Munshi Nawal Bihari Bajpai for the appellant.

Pandit Bishambar Nath for the respondent.

EDGE, C.J.—The plaintiff brought this suit to recover damages for defamatory words spoken by the appellant in reference to the plaintiff's daughter. He also claimed as damages certain expenses being thrown away by reason of the appellants declining to allow his son to take the plaintiff's daughter to his house and refusing to take part in her *gauna*. The lower Appellate Court has awarded Rs. 200 in respect of the defamatory words, and Rs. 200 in respect of the expenses claimed. The appellant did not plead that the words were true; he merely said he had only repeated what he heard. That does not amount to justification. It is contended on behalf

of the appellant that this suit should be dismissed. On behalf of the plaintiff-respondent it was contended that a Hindu father could in his own right and not suing as general attorney or on behalf of his daughter, maintain an action for defamation of his daughter. For that purpose my brother Mahmood's judgment in the case of *Dawan Singh v. Mahip Singh* (1) and the case of *Parvathi v. Mannar* (2) were cited. The judgment of my brother Mahmood does not, in my opinion, support that contention. That judgment was directed to show that in India an action for defamatory work spoken could be maintained not by any person other than the defamed person, but by the person who was defamed, without the allegation or proof of special damages and under circumstances in which a similar action could not be maintained in England. I have mentioned to my brother Mahmood this contention as to his judgment, and he has told me that he did not intend to lay down a proposition that any person, other than the person defamed, could maintain the action for defamation. The case in I. L. R., 8 Mad., to which I have referred, was a suit brought by the person who was actually defamed: consequently it has no bearing on this particular point. In my opinion, an action for defamation can only be brought by the person actually defamed; if the person is *sui juris*, and if the person is not *sui juris*, then under the provision of the Code of Civil Procedure by the guardian or next friend. If any relative, who suffered pain of mind by reason of defamatory language uttered as to another relative could maintain an action for defamation, the defamer might be liable to as many actions as there were members of the family of the person defamed. It was held by the Madras High Court in the case of *Subbaiyar v. Kristnaiyar* (3), that a brother could not maintain an action for the defamation of his sister. I think that is a right decision. It was held by the Bombay High Court in *Luckumsey v. Hurbun Nursey* (4) that the heir and the nearest relative of a deceased person could not maintain a suit for defamatory words spoken of such deceased person, although they were alleged to have caused damage to the plaintiff as a member of the same family.

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(1) I. L. R., 10 All., 425.

(2) I. L. R., 8 Mad., 175.

(3) I. L. R., 1 Mad., 383.

(4) I. L. R., 5 Bom., 590.



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Those two cases show, as I have always understood the law to be that an action for damages is a purely personal action which can only be maintained by or on behalf of the person defamed. The same principle was applied, although not in an action for defamation, by this Court in *Oodai v. Bhowanee Pershad* (1). I am of opinion that so far as this suit is one to recover damages for the defamation of the defendant's daughter, it cannot be maintained. It is not necessary to consider whether the words are actionably defamatory, as we hold that the father has no cause of action in respect of them. So far, I am of opinion, that the appeal should be allowed. As to the part of the suit for expenses incurred by the father thrown away by reason of the acts of the defendants, I am of opinion that the appeal should be dismissed. As I understand the finding of the District Judge, the expenses he has allowed have been reasonably incurred by the plaintiff in reliance on the agreement of the defendant-appellant that the *gauna* should be carried out. The appeal, as to Rs. 200 for *gauna*, will be dismissed with proportionate costs, and the appeal, as to Rs. 200 awarded in respect of the alleged defamation, will be decreed with proportionate costs.

TYRRELL, J.—I fully agree with the view expressed by the learned Chief Justice and in his order disposing of the appeal (2).

*Appeal allowed in part.*

1888  
December 13.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

MUHAMMAD WILAYAT ALI KHAN (PLAINTIFF), v. ABDUL RAB  
AND ANOTHER (DEFENDANTS).\*

*Pre-emption—Wajib-ul-arz—Muhammadan Law—Refusal by pre-emptor to purchase—Immediate demand—Pre-emptor claiming property as to part of which he has disqualified himself from suing.*

The *wajib-ul-arz* of a village provided that a co-sharer wishing to sell his share must give notice to the other co-shares, and that first a nearer co-sharer and next a more distant co-sharer should have a right of pre-emption. Where such notice having

\* First Appeal No. 49 of 1887 from a decree of D. T. Roberts, Esq., District Judge of Moradabad, dated the 23rd December 1886.

(1) 1 Agra, 264.

(2) See *Ajudhia Parshad v. Shibbu Mal* (Punjab Record, 1889, No. 27) in which Rattigan and Roe, JJ., held that a Hindu husband could sue in his own right for damages for defamation of his wife.

been given, the co-sharer receiving notice took no action thereon within a reasonable time,—*held* that as his inaction would lead the vendor to conclude that he would not interfere or become a purchaser, it was equivalent to declining to purchase.

A sale of property, to which the Muhammadan law of pre-emption was applicable, took place in October 1884. The plaintiff pre-emptor and his agent became aware of the sale shortly after it took place, and many months prior to July 1885. He did not allege that he had given notice that he claimed to exercise his right of pre-emption before July 1885. It was found as a fact that no such notice was given.

*Held* that even if such notice was given, it was too late, and was not a prompt demand in accordance with the Muhammadan law.

The principle of the rule that a pre-emptor must claim the whole of the property included in the sale-transaction, and for which one price was paid, if he is entitled to claim it, and cannot obtain a decree for part only of such property, applies to the case of a pre-emptor who claims the whole, but who is at the time disentitled by his own act or laches to maintain the claim as to a part. Such a disqualification prevents the pre-emptor from maintaining his suit for any portion of the property included in the sale.

Where therefore a pre-emptor was disqualified from claiming a portion of the property sold by not having made a prompt demand in accordance with the Muhammadan law in respect of such portion,—*held* that he was thereby prevented from maintaining his suit for another portion claimed under the provisions of the *wajib-ul-ars* of a village, though he was willing to pay the full purchase-money and to leave in the vendee's hands the portion as to which he was disqualified.

THIS was a suit for pre-emption in respect of a sale, dated the 12th October 1884, of a share in the village Muhra in the Moradabad district, and a piece of land in the city of Moradabad. The claim in regard to the share in the village Muhra was based on the *wajib-ul-ars*, the pre-emption clause in which was as follows:—

“A sharer wishing to sell or mortgage his share, or a mortgagee to sub-mortgage his mortgagee's rights, shall first communicate his intentions to the nearer sharer, and in the event of his refusal, to the one next to him, to sell or mortgage the share for a proper price, and if he also refuses to buy it or pay a proper price, then he shall be competent to transfer it to whomsoever he chooses. If a sharer, the transferor, through enmity or in collusion with the transferee, alleges or causes to be entered in the deed an excessive price, then the question shall be referred to and decided by the arbitrators chosen by the parties. If the parties do not come to a settlement as to price amongst

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themselves or by appointing an arbitrator, then the Court shall settle it on its own authority according to the quality of the share or the average price paid before for shares transferred in this or other surrounding villages. If the co-sharers fail to pay the price determined by the arbitrators, then the transferor shall be competent to transfer his share to a stranger, and then no claim as to right of pre-emption shall be admissible. If a sharer, the transferor, makes a transfer in favour of his children or near relations, then no sharer shall have a claim for right of pre-emption and the nearer relations possess a pre-emptive right as opposed to those more remote."

The claim in regard to the property in Moradabad was based on the Muhammadan law.

The Court of first instance (District Judge of Moradabad) dismissed the claim, and the plaintiff appealed to the High Court. The facts are fully stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhry* for the appellant.

Mr. G. E. A. Ross, Mr. *Abdul Majid*, Mr. *Hamid-ullah*, and Shah *Asad Ali*, for the respondents.

EDGE, C.J., and TYRRELL, J.—This was a suit for pre-emption. The defendants were Muhammad Abdul Rab, the vendee, and Wahab Ali, the vendor. The plaintiff and the vendor were half-brothers. They were shareholders in the village Muhra. The property which was sold consists of the shares in the village Muhra, and of a small piece of land in Moradabad itself. The purchaser was a stranger. The sale-deed was executed on the 12th October 1884, and the price was Rs. 4,760. It was one sale transaction for the two properties, and one fixed price. There is no doubt that if the plaintiff had chosen to exercise his rights of pre-emption at the time, he is the person who is entitled to maintain an action for pre-emption in respect of each of these properties. The sale of the share in the village Muhra was governed by the *wajib-ul-arz*, and the sale of the Moradabad land was governed by the principles of the Muhammadan law applicable to pre-emption.

In the Court below it was contended by the plaintiff that the true price was Rs. 4,375, and not Rs. 4,760. That contention has been abandoned here, and there is ample evidence to show that the true price was, as alleged in the sale-deed, Rs. 4,760. It is proved from the evidence that the vendor was in embarrassed circumstances, that some of his property, particularly that in this village, was attached under a decree, and that he was making applications early in 1884 for postponement of the sale. It is also proved, in our opinion, that negotiations for the sale of this property in suit were being carried on certainly in July 1884, and most probably previously. In the Court below the parties appeared to have agreed that the Muhammadan law was the law governing this case. We do not consider that they are bound by any such agreement as that. It is true that in one view of this case the principle of Muhammadan law, which we shall refer to later on, may be a bar to the plaintiff's maintaining the action. The plaintiff's case below was, as it has been here, that he first became aware of the sale in July 1885; and that thereupon he gave a notice required by Muhammadan law declaring himself a pre-emptor. The defendants' case is that the plaintiff knew, if not before the sale, at any rate soon afterwards, of the fact of the sale in question. The plaintiff was the lambardár of the village, and the defendants say that his agent in the village, a man called Budh Sen, knew perfectly well about the sale, and that the plaintiff must have been informed by his agent of what was taking place in the village, in which he was interested, not only as a shareholder, but also as a lambardár. Another part of the case is this. It is said on behalf of the defendant that the vendor in February 1884 gave the plaintiff notice in writing by a registered letter that he was going to sell the property in question to Abdul Rab, the present purchaser, and the plaintiff had not the means or the desire to become a purchaser at that time. There is a contention as to what was the nature of that notice and as to whether any reply was given in fact.

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It will be convenient to consider first of all what is the true construction of the *wajib-ul-arz* in this case. It appears to us that the *wajib-ul-arz* in this case made it incumbent on a sharer, who was going

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to sell, or was desirous of selling, a share in the village, to give notice to his co-sharers. And it was provided by the *wajib-ul-arz* as we read it, that that notice should be given first to the nearer co-sharer, and if he desired to purchase he was entitled to purchase at what is called a "proper" or fair price; and if he did not desire to purchase, then the more distant co-sharer might purchase at a fair price; and if the more distant co-sharer did not purchase, then the shareholder desiring to sell might sell the share to whomsoever he pleased. It provides also the means by which a "proper" or fair price was to be ascertained in case of dispute. It must be ascertained by arbitration or by a suit in Court; that is to say, the co-sharer who had notice had the right to say—"I will purchase the property at a proper price;" and he had the right also, if he did say that, to have it determined, by arbitration, or by suit, what the proper price was. It was also competent to him, under this *wajib-ul-arz*, to say: "I decline to purchase at all." Now that being the construction which we place upon this *wajib-ul-arz*, we have got to see what was the nature of the notice given to the plaintiff in February 1884. As we have said, that notice was in writing. It was sent to the plaintiff under a registered cover; the plaintiff received it and gave a receipt for it. But when the plaintiff is called upon to produce the notice, he does not produce it; but he produces a book in which he says he copied the notice in question. He accounts for copying the notice in the book by saying that he was in the habit of copying important notices into the book to provide for the event of their being lost. The Judge below came to the conclusion that that portion of the book which contains what is said to be a copy of the notice in question was an interpolation. We are not disposed to disagree with him on that point. Assuming, for the purposes of argument, that it is a genuine copy, it is wide enough in our opinion, and sufficiently informed the plaintiff that Wahab Ali was proposing to sell his shares in the villages in the district of Moradabad. The copy shows that Wahab Ali asked the plaintiff to inform him if he wished to purchase the share in any of those villages. We think, therefore, that so far as the giving of a notice was concerned, the vendor complied with the requirements of this *wajib-ul-arz*. The question then arises:—Was

any and what reply sent to that notice ? The plaintiff says that he did send a written reply to the effect:—"If you sell, I will purchase." He was asked how he sent the reply, and he gave no satisfactory account of it. He was asked whether he wrote it himself. He said it was written by some one else, but was unable to say who was the person who wrote it. He kept no copy of it, although he had in his hands the present vendor's notice to him, and says that he took the precaution of copying that into his book. As he says, he kept no copy of the reply which he alleges he sent, written by a person whom he does not know. Now unfortunately in this case Wahab Ali has not given evidence. The defendant-vendee is not to be blamed for that ; he took all the necessary steps to procure his attendance in Court ; so that we have here no direct contradiction to the statement of the plaintiff that he did send that reply. We have, however, evidence which we believe, which is absolutely inconsistent with the plaintiff ever having sent such a reply at all. We know that at that time he was a man involved in debt. We have the evidence of the defendant-purchaser, who tells us that Budh Sen, the plaintiff's particular agent for this village, had told him plainly that he, Budh Sen, as well as his master, the plaintiff, agreed to the sale ; and that Budh Sen had told him that he had advised his master to purchase the village, as it was a large one, but his master would not agree to take it. We have also got the evidence of Bulaki Das on this point. He says that Budh Sen told him of his own accord that he and his master were delighted at Abdul Rab becoming a purchaser. We have also got the answer to interrogatories of Hakim Asghar Ali, in which he tells us that he knew that the plaintiff was not willing to purchase the property at the time ; and further, with regard to the property which was sold by Zohra Begam on the 22nd March 1885, that the plaintiff, when asked whether he would purchase, said that he had not got the money.

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Now we have come to the conclusion that the plaintiff has failed to prove that he did, in fact, reply that he would become the purchaser in the event of the property being sold. If, as we are assuming, he simply took no action within a reasonable time, on the notice

1888 of February 1884, that in our judgment was equivalent to an intimation that he declined to become a purchaser. If failing to take action within a reasonable time is not to be held equivalent to a declining to purchase, the result would be that a sharer wishing to sell property to which a *wajib-ul-ars* such as this applies would practically be unable to dispose of the property at all without the risk of a pre-emption suit. Now on that ground alone we think that the plaintiff would fail in this suit, so far as the share in the village is concerned, to which the *wajib-ul-ars* applies. What we mean is that he had notice that he could purchase, and he acted in such a way as to lead the vendor to conclude that he would not interfere and would not become the purchaser. Of course in all these cases the particular wording of the *wajib-ul-ars* is to be looked at to see what was the custom or contract between the shareholders of the village. The next point to be considered is, when did the plaintiff or his agent know that the sale to the defendant had actually taken place? The patwari of the village knew in July 1884 that the sale was being negotiated, and in that month he called upon Abdul Rab, the purchaser, to give him information as to the area and rent of the village. He tells us that Budh Sen informed him that two years before the time he was giving his evidence he called upon the purchaser to make a salaam to him as a new shareholder in the village. He gave his evidence on the 15th September 1886, so that although two years had not expired from the actual date of the sale, it is pretty evident that the patwari called upon the defendant to make his salaam shortly after the sale, and it is also proved by him that the person who told him that the sale had taken place was Budh Sen. The evidence of the defendant and of Bulaki Das shows not only that Budh Sen knew of this sale about the time, but also that the plaintiff must have known of it too; and that at that time the plaintiff was acquiescing in the sale. Then again there is a letter from Budh Sen to the defendant-purchaser, of the 4th February 1885, which accompanied a present of some sugar-cane juice. That letter and that present of the sugar-cane juice to our mind evidence corroborative of that given by Bulaki Das as to Budh Sen's knowledge. There was no possible reason why that letter should have been written or

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that present sent if Budh Sen did not know that he was writing the letter and sending the present to a new shareholder in the village. Consequently we come to the conclusion that not only Budh Sen but the plaintiff knew, shortly after the sale, of the fact that a sale had taken place, but that they had known that fact many months prior to July 1885. That has an important bearing on one view of the law, which we think is applicable to the case. The property in Moradabad was property not affected by the *wajib-ul-arz* in this case. It was a property which was subject to the ordinary Muhammadan law of pre-emption. It was incumbent on the plaintiff to show that on his obtaining knowledge that the sale had taken place, he gave without delay notice that he claimed to exercise his right of pre-emption. He does not claim to have given such notice until the 17th July 1885, and he has attempted to prove that it was not until that date that he became aware of the sale. He has called some witnesses to show how it was that he became aware of the sale in July, and gave the alleged notice. Those witnesses say that the vendor Wahab Ali told them that the price was Rs. 4,275; in fact, if that is true, he had gone out of his way to give the information. As a fact the price was Rs. 4,700 odd. But it was part of the plaintiff's case here, and in the Court below, that the price alleged in the sale-deed was an untrue one, and that the true price was Rs. 4,275. We do not see why Wahab Ali should have given false information of that kind or what interest he could have had in giving it, particularly when he was on unfriendly terms with the plaintiff, his half-brother. We believe that the story of those witnesses, as to the statement with regard to price, was a false story, brought in for the purpose of supporting the plaintiff's case that Rs. 4,700 was not the real price. Now the whole of the evidence relating to what we may call the July incident appears to us to be too well prepared. It appears to us to be evidence that has been prepared for the purposes of this suit. The plaintiff says that he sent a written notice in July. It is curious that although he gave two notices to the defendants to produce documents in this case, the written notice is not included in either of them. We believe that this evidence as to the July incident was concocted, partly with the intention of disputing the true

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1888 price of the property, and partly to get the plaintiff over the difficulty in which he was with regard to the rules of the Muhammadan law as to making a prompt demand to purchase as a pre-emptor. On that point it has been pointed out by Mr. *Ross* that when there were negotiations in October and November 1885 for the settlement of this case between the plaintiff and the purchaser, there is not a single thing to suggest in the correspondence, so far as we have seen, that any such notice had been given in the previous July. That was hardly to be overlooked. We have said we have come to the conclusion that no such notice was given, and if it was given, then we still think it was too late, and was not a prompt demand.

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This raises another question in this case. It is a question on which, although we have formed an opinion, we express that opinion with some hesitation. There can be no doubt that a plaintiff coming into Court in a pre-emption suit, if he is a person having a right to claim the whole property sold, must in his suit make that claim; that is, he cannot come into Court and claim a portion only when he is entitled to the whole. That is we think settled law. That question has been considered in the cases of *Kashi Nath v. Mukhta Prasad* (1), *Arjun Singh v. Sarfaraz Singh* (2), as well as in many other cases decided in this Court. According to the judgment of Mr. Justice Mahmood in one of those cases, the plaintiff must claim the whole of the property included in the sale-deed, if he is a person entitled to claim it, and his action must stand dismissed if he fails to claim the whole of that property. Mr. Justice Mahmood has expressed his reason for that view of the law, and it appears to us that that is a rule of law which is consistent with common sense. The pre-emptive plaintiff should not be allowed to take, for instance, the best portion of the property brought, and leave the worst on the hands of the purchaser, or on the hands of the vendor. It is said here that the plaintiff is willing to pay the full purchase-money, and leave in the hands of the purchaser the property in Moradabad. Possibly in this particular case the purchaser would not be a sufferer if that was accepted. But we can understand cases in which the purchaser was induced to take property, which otherwise he

(1) I. L. R., 6 All., 370.

(2) I. L. R., 10 All., 182.

would not have taken, in order to obtain the sale to him of other property which he desired. In such a case as that it might well be that although the whole of the purchase-money was refunded to him, it would be to his disadvantage to be left with the incumbrance of a portion of the property. The question then arises; can there be any difference between the case of a plaintiff coming into Court and claiming a portion of the property sold, and the case of a plaintiff coming into Court and claiming the whole, he being at the time disentitled by his own act or laches to maintain a claim as to a part? It appears to us there can be no difference in principle; and that exactly the same result must follow in this case as would have followed if the plaintiff had come into Court and had abstained from claiming the property in Moradabad. A person, who claims to be a pre-emptor and has disqualified himself from claiming the whole, cannot be in a better position than a person who has come into Court and has claimed a part only, when he was entitled to claim the whole. In the view which we take, the plaintiff was disqualified from claiming the property in Moradabad, and we think that disqualification would prevent him from maintaining his suit for any portion of this property which was included in one common sale and for which one price was paid. There is one word more to be said and that has reference to the point raised by Pandit *Ajudhia Nath* with regard to a receipt given by the vendor in November 1884. The Judge below has explained that circumstance on the hypothesis as to family arrangement which had existed between the vendor, the plaintiff, and the other members of the family. We are not satisfied with that explanation and do not think that it is a correct one. But we are also not satisfied that the money acknowledged to be received then was money which became due out of the sale to the defendant-purchaser. There are certain other receipts which were tendered in evidence before us. They are not on the record and we have not looked at them, being of opinion that they were not proved and were not admitted by the defendants in the suit.

Shortly, in the result, we are of opinion that the plaintiff's claim must fail, so far as the share in the village Muhra is concerned, because we find that the defendant vendor did all that was required of him by the *wajib-ul-arz* and the plaintiff did not avail himself of

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1888 the right of purchase given by that *wajib-ul-arz*. We find also  
 MUHAMMAD that the suit must fail as to the Moradabad property, because the  
 WILAYAT plaintiff did not make a prompt demand as pre-emptor; and also  
 ALI KHAN for the reason we have just now explained, the suit must fail not  
 v. only with regard to the Moradabad property, but also with regard  
 ABDUL RAB. to the share in the village; the plaintiff, having disentitled himself  
 to obtain pre-emption in the Moradabad property, cannot obtain  
 the share in the village. The appeal is dismissed with costs.

*Appeal dismissed.*

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 July 12.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

LOKE INDAR SINGH AND OTHERS (PLAINTIFFS) v. RUP SINGH  
 (DEFENDANT). \*

*Unconscionable bargain—Gambling in litigation—Agreement opposed to  
 public policy—Act IX of 1872 (Contract Act), s. 23.*

For the purpose of meeting the expenses of an appeal to the Privy Council from concurrent decrees of the Subordinate Judge and the High Court, the plaintiff appellant executed a deed of sale of certain property worth over Rs. 50,000 in consideration of the vendees providing the necessary security and monies. The plaintiff experienced considerable difficulty in procuring the means to appeal. The vendees were not professional money-lenders, they did not put pressure on the plaintiff, but, on the contrary, he and his agent put pressure on them to agree to the terms of the deed. It appeared that, apart from the monies borrowed by him from time to time, he was without even the means of subsistence; that he fully understood the nature of the deed; that his agents negotiated the transaction *bonâ fide* and, to the best of their powers, in his interest; that there was no fraud or deception on the part of the vendees; and that they performed all that they undertook as regards meeting the expenses of the appeal. Under the deed the plaintiffs were liable to furnish security to the extent of Rs. 4,000 and to advance Rs. 8,500 for other necessary expenses, and they did in fact furnish such security and advanced sums aggregating Rs. 7,542. The appeal was successful. The appellant having failed to put the vendees in possession of the property conveyed by the deed and recovered by him under the Privy Council's decree, the vendees sued him for possession of the property and mesne profits, afterwards agreeing that the Court should, in lieu thereof, award them compensation in money equivalent thereto.

\* First Appeal, No. 125 of 1886, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 24th April 1886.

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*Held* that, although the case was very different from cases in which persons interfered for their own benefit in litigation not their own, or in which mukhtars, vakils or persons of that class or professional money-lenders taking advantage of the borrower's position, sued to enforce a contract obtained by them from him, and although the defendant was not entitled to sympathy, yet, judging by the disproportion between the liability incurred by the plaintiffs under the contract and the reward which they were to obtain in the event of the defendant's success, it must be concluded either that they did not believe his claim to be well founded, and consequently entered, though unwillingly, into a gambling transaction, or, if they believed the claim to be well founded, that the reward contracted for was excessive and unconscionable; and in either case the contract could not be enforced in its terms.

*Held* also that, if the doctrine of equity applicable to such cases were applied in favour of the borrower, it should also be applied in favour of the lender; that as there was no reason to suspect the plaintiffs' motives, it would be inequitable to relieve the defendant from all liability; that it was only fair that he should compensate the plaintiffs for the use of their security bonds from the date when they were deposited in the High Court to the earliest date after the judgment of the Privy Council when the plaintiffs could have obtained them back; that simple interest at 12 per cent. per annum on the amounts of the bonds for that period would be reasonable compensation for such use; that the defendant should also repay the amounts advanced by the plaintiffs for the expenses of the litigation with interest on each advance at 20 per cent. from the date on which it was made to the date of the decree in the present case; and that he should pay interest on the whole amount thus decreed at 6 per cent. from the date of the decree till payment.

*Chunni Kuar v. Rup Singh* (1), *Raja Sahib Prahlad Sen v. Baboo Budhu Singh* (2) and *Bowes v. Heaps* (3) referred to.

The facts of this case are stated in the report of *Chunni Kuar v. Rup Singh* (1) and in the judgments of the Court.

The suit was based on a deed of sale executed in favour of the plaintiffs by the defendant on the 13th March 1882 in the following terms :—

"I, Raja Rup Singh, son of Raja Mukat Singh, caste Thakur Sengar, rais of Bhara, pargana Uraiya, zila Etawah, do hereby declare as follows :—Whereas I instituted a suit against Rani Baisni, widow of Raja Mohendra Singh, deceased, caste Thakur, *masnad-nashin* (occupying the throne) of the Bhara Raj, and the Collector of Etawah as the manager of the Court of Wards, for recovery of possession of the Bhara estate, containing moveable and immoveable property, specified in the plaint, at a valuation of Rs. 3,10,265-8 in the District Court of Mainpuri, where it was dismissed. As I was possessed of no means, it was difficult for me to file an appeal in the High Court, and I appealed by giving a bond to

(1) *Ante*, p. 57. (2) 12 Moo. I. A., 275.

(3) 3 Ves. & B., 117.

1888 Musammat Chunni Kuar, widow of Sah Panni Lal, *rais* of Matchra, zila Etah, but unfortunately for me the appeal was dismissed. Thus arose the necessity for filing an appeal to the Privy Council. It is clear I have not a pice, and my only hope for justice lies in an appeal to the Privy Council. I have therefore with entreaties got Raja Loke Indar Singh-Sheikh Nasrat Hussain, Lala Bhikari Das, Munshi Har Narain, Bibi Chunni Kuar, and Kuar Dharam Singh, persons belonging to the first class given below, to consent that they should meet the costs of the Privy Council, including security, by way of a help to me, and should in lieu thereof be the proprietors of an eighth share of the property involved in the case, with the exception of those articles. They have accepted the proposal and deposited the security and the translation fees, and have undertaken to pay the other expenses of the Privy Council appeal. Dewan Ganga Prasad has, from the very beginning, tried in the case, and I owe to him his pay and compensation for his labour. I have got him to agree to take Rs. 5,000 out of the second class of the claim, *i.e.*, that for debts when the case is decreed. I do therefore willingly and voluntarily and while in a sound state of my body and mind, execute this deed in favour of the following persons:—

“My suit consists of four claims:—

“1. For mauza Bhara the Raj Mahal, together with other villages, appertaining to it, bearing a jama of Rs. 34,463-8, five times of which, *viz.*, Rs. 1,72,317-8, is given in the plaint as the valuation.

“2. Outstanding debts of the estate amounting to Rs. 64,155.

“3. Notes worth Rs. 21,090.

“4. Cash and the gadhi, &c., valued at Rs. 52,703.

“Of these four claims, the last two have been exempted from this contract; and I hereby sell the first two claims, amounting to Rs. 29,559-1, to the first class of the following persons, and Rs. 5,000, out of Rs 56,135-4, the balance left after deducting Rs. 8,019-12, the eighth share referred to above, from the said sum of Rs. 64,155, the second sort of claim, to Dewan Ganga Prasad. The consideration of this sale as against the first class of vendees is Rs. 12,500, the estimated cost of the Privy Council appeal, consisting of Rs. 4,000 for the security of the Privy Council costs, and Rs. 8,500 for the translation of papers, the pleader's fee, and other expenses of every sort in the said department, and as against the second class of vendees, Rs. 2,500, which has been agreed to be his pay from the beginning of July, 1877, *i.e.*, the institution of the suit. Thus the whole amount of the sale consideration is Rs. 15,000, with reference to which the court-fee has been paid. I or my heirs, successors and representatives shall not question the genuineness of this sale-deed. The sale-deed shall be acted upon on the following conditions:—

“1. The names of the purchasers and the details of the shares are given at the foot of the sale-deed, and according to them they shall be the sharers in the property sold, and in proportion to their respective shares, they shall be liable to pay the sale-consideration, *viz.*, security and other expenses of the appeal to the Privy Council.

"2. After the passing of a decree by the Privy Council, the purchasers shall have the power to join me in the execution of the decree to the extent of their share under this sale-deed, and obtain possession of the property sold, and I shall make them co-sharers under this sale-deed. Should there be any remissness on my part in the conduct of the case, or should I come to terms with the opposite party, or there be any apprehension of a failure of the case by any reason, accident or unforeseen event, and even in the absence of any such cause, if the purchasers have any desire to join in the case, they shall have the power, under this document, to join with me to the extent of the property sold and get their names recorded as the appellants.

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"3. In connection with the powers mentioned above, it has been agreed upon that, after the passing of the decree, the purchasers of the first class shall have an eighth share in all the villages concerned. Should I offer to give in lieu of the above entire villages, excepting villages, 1 Bhara, 2 Haroli, 3 Sikanri, 4 Agana, 5 Barera, 6 Gauhani Kalan, 7 Mahewa, 8 Sijanpur, 9 Athesa and 10 Malgawana, yielding profits equal to an eighth share, they (purchasers) shall accept the same without an objection after seeing that the profits amounted to an eighth share.

"4. The purchasers have no concern whatever with the costs already incurred in the Lower Courts, and they are not liable or responsible for the same, for they had no concern with the case so long as it pended in the Lower Courts. They are only liable for costs that may be incurred in the Privy Council, in respect of which a security has been deposited. They have accordingly deposited the security-money. The remaining expenses are those which may be made on behalf of the appellant.

"5. I am liable to satisfy the old bond executed as between myself and Chunni Kuar, and the demand of the pleaders in the District Court, according to the terms of the deed in their favour. The purchasers, their property or the property sold shall have no concern with the same. The purchasers will get the property free from all liability.

"6. In lieu of the pay of Dewan Ganga Prasad, who has, ever since the institution of the suit, taken great pains to help the conduct of the case, I have sold to the said Dewan Rs. 5,000 out of Rs. 53,135-4, the balance of the debts due to me, forming the second class of claim. After the decree he and his representatives and heirs shall have the right and power to recover it under this sale-deed from the debtors, from myself or from the property claimed in this case. I, my heirs and representatives, shall have no objection. I have, therefore, executed these few words by way of a sale-deed that they may serve as evidence and be used when needed."

In pursuance of this agreement, the plaintiffs deposited in the High Court a bond for Rs 4,000 as security for the appeal, and advanced sums aggregating Rs. 7,542 for translation and other

1888 expenses. The defendant, on the 24th April 1884, obtained a decree in the Privy Council, reversing the decision of the High Court and awarding him possession of the estate claimed by him in that suit, and an application for review of judgment was rejected by the Privy Council on the 29th November 1884. The plaintiffs, on the 31st January 1888, brought this suit against the defendant for possession of the property conveyed by the deed.

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The Court of first instance dismissed the claim, on the ground that the agreement contained in the deed of the 13th March 1882, was unconscionable, extortionate, and opposed to public policy. The plaintiffs appealed to the High Court.

Upon the case coming on for hearing before Edge, C.J., and Tyrrell, J., the appellants, through their counsel, informed the Court that, in the event of the Court's decree being in their favour they were willing to take, in lieu of the one-eighth share included in the deed, compensation in money equivalent to the share. The Court directed that a commission should issue to the Collector of Etawah, requesting him to make an investigation into the market-value, on the 1st December 1884, of the villages in which the one-eighth share was claimed and to report thereon to the Court. The Collector reported the market-value of the villages in question on the 1st December 1884 to have been 4 lakhs of rupees. It thus appeared that the value of the one-eighth share conveyed by the deed of the 13th March 1882 was Rs. 50,000. The case again came on for hearing before Edge, C.J., and Tyrrell, J.

The Hon. T. Conlan, the Hon Pandit *Ajudhia Nath*, Pandit *Sundar Lal* and Pandit *Moti Lal Nehru* for the appellants.

Mr. D. N. Banerji for the respondent.

EDGE, C.J., and TYRRELL, J.—The suit was brought in the Court of the Subordinate Judge of a Mainpuri on sale-deed executed by the defendant on the 13th March 1882. The Subordinate Judge dismissed the suit with costs. From that decree this appeal has been brought. We have in our judgment in *Chunni Kuar v. Rup Singh* (1) stated nearly all the material facts which were antecedent to the execution by the defendant of the sale-deed of the 13th March 1882, and also the result of the litigation in the previous

(1) *Ante*, p. 57.

suit, in which the now defendant obtained possession of the Raj Bhara estate and the accumulated income of that estate. So far as the facts concerning the execution of the deed in this case are concerned, there is but little to add. Those facts are given in detail in the evidence of Muhammad Mohsin, which we believe.

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We have no doubt, in fact we find that the defendant perfectly well understood the nature and effect of the deed of the 13th March 1882; we also find that his agents, who negotiated that transaction, acted *bona fide* and to the best of their powers in the interest of the defendant, placed as he was in a position of great difficulty at the time. Of anything like actual fraud or of any deception on the part of the plaintiffs or the defendant's agent, we find there was none. It has been contended on the part of the defendant that, having regard to the judgments of their Lordships of the Privy Council in case of *Raja Sahib Prahlad Sen v. Babu Budhu Singh* (1), we cannot give any relief whatsoever to the plaintiffs here. That case was one essentially different from the case before us. In that case the assignee or vendee was not the person seeking to enforce the contract. The person there, who was seeking to enforce the contract, was a person who had purchased the contract from the original vendee for a comparatively small sum. It was plain in that case that if the plaintiff failed to enforce the contract he had purchased, he was not in a position to fall back on and ask for the consideration his assignor had given. That was not the right which he had purchased. There is the other distinction between that case and this, that here the plaintiffs performed all that they undertook to perform, whereas in the case of *Raja Sahib Prahlad Sen v. Babu Budhu Singh* (1) the original vendee had not, nor had the assignee performed the vendor's part of the contract. There were two other cases referred to, which, in the view we take of the case, we need not consider. On behalf of the defendant it was also contended that it was a gambling transaction, that the bargain was unconscionable, and that to enforce the contract would be against public policy. In *Chunni Kuar v. Rup Singh* (2) we have given expression

(1) 12 Moo. I. A., 275.

(2) *Ante*, p. 57.



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to what we have conceived to be the law bearing on cases of this kind. In this case undoubtedly the defendant was in a position of very great distress: his suit had been dismissed in the Court of the Subordinate Judge; his appeal from the decree of the Subordinate Judge had been dismissed by this Court; he was without any means, and unless he obtained assistance on such security as he could offer, he could not have filed or prosecuted his appeal to the Privy Council. So far as we have been able to ascertain, he had not even the means of subsistence. That he had a good case was proved by his success in the appeal to the Privy Council. That people generally considered that his case was a bad one may be inferred from the difficulty he met with in procuring the means to appeal to the Privy Council. At that time he had the decrees of the two Courts against him. The plaintiffs in this case did not seek the defendant. They did not press the defendant to accept the terms contained in the deed of the 13th March 1882. It was the defendant and his agent who put pressure on the plaintiffs to advance the money on the terms contained in that deed. Some of the plaintiffs are not money-lenders by profession. Two of them are independent gentlemen who were residing on their own estates. That the defendant, even after he had obtained his decree in the Privy Council, never thought there was anything unconscionable in the transaction, may be inferred from the fact it was he who proposed that the plaintiffs, instead of taking the shares in the village assigned by the deed of the 13th March 1882, should take a sum of Rs. 50,000. At that time apparently this defendant Raja, thankful for the assistance which had been rendered to him, an assistance which placed him in the position of a wealthy man and relieved him from the position of being a man without the means of subsistence, honestly intended to perform his contract and discharge the debt which he had incurred. It was not until after that time that this gentleman thought it advisable, having obtained all the benefit which he needed from the use of the plaintiffs' money, to invoke the assistance of the law to enable him to avoid the performance of a contract which the plaintiffs, believing in his honour, had treated as a valid contract, and on which they advanced their money and incurred liability. There

is, in our judgment, a very wide difference between this case and many other cases in which persons interfere in litigations, not their own, for their own benefit. If the plaintiffs here had been professional mukhtars, vakils or persons of that class, or if they had been professional money-lenders who had taken advantage of the position of the defendant to obtain from him a contract of this kind, we should, without hesitation, have given them no relief whatever. But they are not persons of that class; they had not volunteered their assistance to promote the litigation; they had given reluctantly this assistance to help a neighbour in a case which was apparently almost hopeless at the time. They trusted in the honour of the Raja as a native gentleman. He had no security to offer, except what then appeared to be the chance of his succeeding in a case in which he had been twice defeated. We confess that, in this case, our sympathies are entirely with the plaintiffs; and we do not refuse to decree their claim for possession of the share out of any sympathy for the defendant. As we have pointed out in the judgment we have already referred to, the fact that the borrower had fruitlessly sought assistance from other persons, who refused the bargain on the ground that it was not advantageous, has been held by the Courts in England to be merely proof of the distress of the borrower and not evidence that the bargain was a fair one and not an unconscionable one. In this case, judging by the disproportion between the liability which the plaintiffs incurred under the contract and the amount of the reward which they were to obtain in the event of the defendant succeeding in the Privy Council, we are compelled to conclude either that the plaintiffs did not believe that the defendant's claim in the action was well founded, and consequently entered, although unwillingly, into a gambling transaction, or that if they did believe that his claim was well founded, then the reward, which under their contract they were to obtain, was excessive and unconscionable. In either event, we could not enforce this contract in its terms. As was said by Sir William Grant in the case of *Bowes v. Heaps* (1)—“It is not, however, every bargain which distress may induce one man to offer that another is at liberty to accept.” It is true that Sir William

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(1) 2 Ves. B B., 117.

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Grant was dealing in that case with a reversioner or a remainder man, but we are told by their Lordships of the Privy Council that the doctrine of equity, which applies in those cases, is to be applied in India and apparently in cases which it would not be applicable in England. If we are to apply that doctrine of equity in favour of the borrower, we should also apply the doctrine of equity in such case in favour of the lender. It is contended in this case on behalf of the defendant that we should not even give a pice to the plaintiffs who advanced their money and deposited their security-bond in this Court. As we have said, if this was a case in which we had reason to suspect the motive of the lenders, we would, without hesitation, leave them without any remedy, so far as we are concerned. But this is a totally different case, and we think it would be inequitable on our part if we were to relieve the defendant from all liability to the plaintiffs. On the 31st January 1881 the plaintiffs deposited in this Court their security-bond for Rs. 4,000 as security for costs to be incurred in the Privy Council. Their Lordships of the Privy Council gave judgment in the appeal in March or April 1884 in favour of the defendant. On the 21st April 1884 the Registrar of the Privy Council gave notice of the decree under the seal of the Council. Allowing for the course of the post, the plaintiffs at the earliest could not have obtained their bonds from this Court before the 21st May 1884. We think that it is only fair between these parties that the defendant should be obliged to compensate the plaintiffs for the use of their bonds during that time, that is to say, from the 31st January 1881 until the 21st May 1884. We think that a most reasonable compensation to be paid by the defendant to the plaintiffs for the use of their bonds for that time is simple interest at 12 per cent. *per annum* on the amount of those bonds for that period. The plaintiffs advanced Rs. 783 for expenses of translation and printing of the documents in this Court; of that sum Rs. 691 was actually paid into this Court by the 10th May 1881, and from that date we allow interest on that sum until the date of our decree at 20 per cent. *per annum*, Rupees 92 of the Rs. 783 were paid by 22nd September 1882; the precise date we cannot ascertain, but this is the date on which the papers were forwarded

to the Privy Council, and similar interest is allowed on the Rs. 92 from the 22nd September 1882 until the date of our decree. Then comes the item of Rs. 4,759; that money was advanced, a great portion of it in the early months of 1883, and the whole of it by the 1st August 1883. We take that as a lump sum and we take the date of the 1st August 1883, a date rather in favour of the defendant, as a starting point for interest, and we allow on that sum of Rs. 4,759 similar interest to the date of our decree from the 1st August 1883. There only remains a sum of Rs. 2,000. This was a sum which was advanced by those parties for the purpose of the review. Unfortunately, Pandit *Nand Lal*, a well-known pleader of this Court, who might have given us precise information on that point, is not now alive, but we know from the evidence that a sum of Rs. 2,000 was advanced for the purpose of the review which was applied for in the Privy Council, and we conclude that it must have been advanced before the 29th November 1884, as on that date their Lordships of the Privy Council rejected the application for review. We allow similar interest on that Rs. 2,000 from the 29th November 1884 to the date of our decree, and we decree that the defendant do pay to the plaintiffs the several sums mentioned by us together with interest from the date which we have mentioned. We do not include in the amount decreed the amounts for which the bond was given. We also decree the costs of this litigation to be paid by the defendant to the plaintiffs, and further decree that the amount above indicated, which we may call debt and costs will bear interest at 6 per cent. from the date for our decree till satisfaction and payment. The result is we allow with costs this appeal to the extent indicated by us (1).

*Appeal allowed in part.*

(1) See *Fry v. Lane* (L. R., 40 Ch. D., 312).

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*Before Mr. Justice Brodhurst and Mr. Justice Tyrrell.*

**HUSAIN BAKHSH AND ANOTHER (PLAINTIFFS) v. RAHMAT HUSAIN  
AND ANOTHER (DEFENDANTS).\***

*Agreement opposed to public policy—Speculative transaction—Act IX of  
1872 (Contract Act), s. 23.*

For the purpose of meeting the expenses of a suit for possession of immoveable property, the plaintiff, who was in straitened circumstances, agreed with the defendant that the latter, in consideration of paying such expenses from the Court of first instance up to the High Court, should have half the property and half the mesne profits, with all his costs, in the event of success. The suit was brought and was conducted by the plaintiff and the defendant jointly, and was decreed by the High Court on appeal, and the defendant obtained possession of half the property. The plaintiff sued to recover possession of the half, on the ground that the agreement was illegal and void. It appeared that the amount actually spent by the defendant in the former litigation was Rs. 368, and that, if that suit had failed, he would have lost about Rs. 600. It was found that the value of the half share of the property was about Rs. 1,000.

*Held*, that the agreement was unfair, unreasonable, extortionate and contrary to public policy, within the meaning of s. 23 of the Contract Act (IX of 1872), and that the plaintiff was entitled to recover possession of the land in suit on payment of compensation for the advances made by the defendant in the former litigation, with interest at 12 per cent. per annum. *Chunni Kuar v. Rup Singh* (1) and *Loke Indar Singh v. Rup Singh* (2) referred to.

THE facts of this case were as follows. The plaintiffs, Husain Bakhsh and Nabi Bakhsh, brought a suit against one Ram Sarup to recover possession of 51 bighas 11 biswas 4 dhurs of land, of which he had dispossessed them. At the time when they brought the suit they were in pecuniary difficulties, and apparently the period of limitation within which the suit had to be instituted was about to expire. For the purpose of meeting the expenses of the litigation, they, on the 20th January 1881, executed, jointly with the defendants, Rahmat Husain and Amanat Ali, an agreement whereby it was provided, *inter alia*, that the defendants should pay all the plaintiffs' expenses of the suit from the Court of first instance to the High Court, and that, in consideration of such payment and in the event of the plaintiffs being successful, the defendants should be

\* Second Appeal No. 32 of 1887 from a decree of F. E. Elliot, Esq., District Judge of Allahabad, dated the 16th August 1886, reversing a decree of Babu Abinash Chander Banerji, Subordinate Judge of Allahabad, dated the 10th February 1885.

(1) *Ante*, p. 57.

(2) *Ante*, p. 118.

entitled to half the land recovered with half mesne profits and all costs incurred by them in the suit. The suit was then brought, both the plaintiffs and the defendants in the present suit being plaintiffs, on the 1st February 1881, and on the 11th April 1882 was decreed by the High Court on appeal. In execution of the decree the decree-holders obtained possession of the land and realized the profits and costs in suit. On the 17th May 1884 the defendants were recorded in the revenue registers as proprietors of 25 bighas 15 biswas and 12 dhurs, half the land so recovered, notwithstanding objections raised by the plaintiffs.

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The plaintiffs thereupon instituted the present suit for recovery of possession of the 25 bighas 15 biswas 12 dhurs and mesne profits on the ground that the agreement of the 20th January 1881, so far as regarded the stipulation for giving half the land originally sued for to the defendants, was illegal and void. In defence the defendants contended that the agreement was freely and voluntarily executed by the plaintiffs for good consideration, and that they were entitled to retain possession.

The Court of first instance (Subordinate Judge of Allahabad) decreed the claim. Upon the material issue in the case the Court's judgment was as follows:—

“ It appears that on the 19th September 1882 the plaintiff, Nabi Bakhsh, mortgaged his one-fourth share in the land to Ghazi for Rs. 1,000. The plaintiff contends, therefore, that the whole land, or 51 bighas 11 biswas 4 dhurs, is worth more than Rs. 4,000, and so the half of it in the defendants' possession is worth Rs. 2,000 ; and the defendants have not questioned this allegation in their written statement. In the agreement itself half of the land, or 25 bighas 15 biswas 12 dhurs, is valued at Rs. 830, and in the former suit the 51 bighas 11 biswas 12 dhurs were valued at Rs. 1,660. It is not shown how that former valuation was made. The fact that one-fourth of the land has been actually mortgaged for Rs. 1,000 cannot be ignored.....The witness Man-nu, whose evidence has not been rebutted, swears that the 12 or

1888      13 bighas mortgaged to him yield him a profit of Rs. 30 a year. At that rate also, the plaintiffs' present valuation of the land does not appear to be excessive.

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"Then, as to the risk run by the defendants, I sent for the records of the former suit and they showed that the amount actually spent by them in the three Courts was Rs. 368-10-0 and the amount spent by Ram Sarup was Rs. 222-1-0. If the suit had failed, the defendants would have had to pay Ram Sarup costs. The defendants underwent a risk, therefore, of losing Rs. 590-11-0.

"For this risk the agreement gave the defendants not only all their costs, but also as a reward half the mesne profits, or half Rs. 347-4-6 (the amount which Ram Sarup paid on account of mesne profits on the 4th September 1883), and also half the land, which I now find to be worth about Rs. 2,000, and to yield a profit of Rs. 100 a year.

"Now, the question which I have to determine in this case is whether the plaintiffs are entitled to avoid this agreement, that is, whether they are equitably entitled to be relieved from its effects by paying some reasonable money compensation to the defendants for their trouble and expense in the former suit, for it is on such terms that the plaintiffs themselves wish to be relieved from the effects of the agreement.

"There is no specific law against maintenance and champerty in this agreement, but champertous agreements of this kind have always been looked upon with disfavour by the Courts on the ground that they are against public policy. The matter has been fully and elaborately discussed in the well-known case of *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1) by the Judicial Committee of the Privy Council. After an exhaustive examination of the numerous rulings and authorities on the point, their Lordships lay down the following propositions, which we are bound to accept for our guidance. [The learned Subordinate Judge read the passage reported

(1) L. R. 4 I. A., 23.

at p. 46 of the fourth volume of the Law Reports, Indian Appeals, and quoted in the case of *Chunni Kuar v. Rup Singh* (1) and continued :—]

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“Applying these rules to the present case, I am of opinion that the agreement in dispute is ‘extortionate and unconscionable, so as to be inequitable against’ the plaintiffs, and that the recompense provided for by it is not ‘reasonable.’ The purport of the agreement was that, for an outlay of about Rs. 350, the defendants were not only to get that money, but also half the mesne profits and half the property. The pecuniary value of that recompense, I find to be nearly Rs. 2,200, or about seven times the outlay. In the result the defendants not only got their outlay, but make a clear profit of nearly Rs. 200 in cash and of Rs. 2,000 in valuable immoveable property.

“The case which I find to be most similar to this case is that of *Grose v. Amirtamayi Dasi* (2). [The learned Subordinate Judge, after stating the facts of that case, continued :—] I think that the reasons for which Bamasundari’s agreement was set aside are quite applicable to this case, and that, so far as the plaintiffs’ agreement gives a moiety of the land in suit to the defendants, it ought to be set aside, and the plaintiffs ought to be relieved from its effects. He who seeks equity, however, ought to do it himself. Acting on this principle, the plaintiffs have rightly agreed to give the defendants a fair and reasonable compensation for the advances made by them in the former litigation, and they have agreed that the amount that may be found due to the defendants may be made a charge on the moiety of the land that is now in their (the defendants’) possession.”

The Court decreed the claim, directing that the plaintiffs should pay the defendants, as compensation for the advances made by them, Rs. 330, with interest at the rate of 12 per cent. per annum, and that each side should bear its own costs.

(1) *Ante*, at pp. 66, 67.

(2) 4 B. L. R., O. C. J. 1.



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The defendants appealed from this decree to the District Judge of Allahabad. The principal portion of the judgment on the appeal was as follows:—

“ On the main issue as to whether the plaintiffs-respondents are entitled to escape from the fulfilment of an agreement deliberately entered into, I do not agree with the conclusions arrived at by the Lower Court. The circumstances of the case do not correspond with those of the case quoted by the Lower Court, *Grose v. Amirtamayi Dasi* (1). That was a case in which an extortionate bargain had been driven with a widow, under which the person supplying the funds for litigation was to get a clear moiety for himself and to have a charge on the other moiety for recovery of all monies expended with interest. The claim was resisted not by the widow herself, but by her heirs. Here the plaintiffs are grown up men of fifty and thirty-five, respectively, and, presumably, able to take care of themselves. There is no evidence to show or reason to believe that they were taken undue advantage of, and it is they themselves (and not others whose rights they have given away) who seek to evade the fulfilment of what appears to have been a fair bargain. The bad faith of the plaintiffs-respondents is apparent in their attempt to shuffle out of their agreement on the pretence that the defendants-appellants had not done their part,—a pretence clearly exposed by the Lower Court.

“ The remuneration secured to the defendants-appellants was, no doubt, considerable; but there is nothing to show that the transaction had anything in it of a gambling or speculative character, or was otherwise opposed to public policy. It was one involving some risk: the defendants stood to lose Rs. 590, say Rs. 600, on it in costs of the Courts. The suit was dismissed by the Court of first instance and by the Lower Appellate Court, whose decision was carried in appeal before, and confirmed by, the High Court. It was thus a case of some difficulty, and it was, no doubt, known that it would be fought out to the end. The Lower Court has made no allowance for the defendants-appellants' labour and trouble. The

(1) 4 B. L. R., O. C. J. 1.

remuneration, though large, was not, in my opinion, extortionate, and it has perhaps been over-estimated by the Lower Court at Rs. 2,000 besides half mesne profits and recovery of outlay with interest. The plaintiffs-respondents themselves valued the whole land in this suit at Rs. 1,660, and its half is valued in the agreement at Rs. 830. To this amount, at least, the defendants are fairly entitled. But, if the land is worth more, they are still entitled to claim it under the express agreement entered into.

“The effect of the Lower Court’s order, if maintained, would be to create a precedent and make it impossible for any intending litigant, unprovided with the necessary funds, to obtain them on ordinary terms from persons who would not be willing to advance the money on such terms in view of the risk and want of security, but might be deceived into advancing it on the faith of an agreement securing special terms, which the borrower would repudiate with the sanction of the Court.”

The Court accordingly decreed the appeal and dismissed the suit with costs. The plaintiffs appealed to the High Court.

Munshi *Ram Prasad* for the appellants.

Mr. *Amir-ud-din* for the respondents.

TYRELL and BRODHURST, JJ.—In this case the defendants-respondents helped the plaintiffs-appellants to recover from one Ram Sarup a *nankar* holding of 51 bighas 11 biswas 4 dhurs, the plaintiffs promising the defendants that they should have half the property and half the mesne profits with all their costs in the event of success in the suit. The plaintiffs did succeed in that suit and recovered their 51 bighas 11 biswas 4 dhurs with profits. The defendants, who were co-plaintiffs in that suit, and who consequently were entitled to execute the decree obtained in that suit jointly with the plaintiffs in this suit, took half the profits awarded under that decree and their costs, and got possession of half the land amounting to 25 bighas 15 biswas 12 dhurs. The present action has been brought to eject them from the land. The Subordinate Judge of Allahabad decreed the claim, holding that the defendants had received sufficient compensation for the advance they made to the plaintiffs by getting the sum of Rs. 330 with

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interest, which the plaintiffs were to pay to them at the rate of 12 per cent. per annum. The learned Subordinate Judge found that the bargain between the plaintiffs in the former suit was unconscionable and extortionate, and, as such, was inequitable against the plaintiffs in the present suit. He found the recompense secured to the present defendants was grossly unreasonable, inasmuch as the expense they had to incur was small, the risks they ran were inconsiderable, the labour they had to undergo was little or nothing, while the land which they had taken possession of was worth fully one thousand rupees. The Subordinate Judge accordingly decreed the plaintiffs the recovery of the land on condition of their paying the defendants Rs. 330 with interest at 12 per cent. per annum from the 10th February 1885 to the date of payment. The learned District Judge of Allahabad reversed the decree and dismissed the plaintiffs' suit upon the following grounds. He found that the bargain was fair, because although the entire land is probably worth Rs. 2,000, the plaintiffs knew their own business, and it was undesirable that the Court should make contracts for parties. The District Judge also thought that the Subordinate Judge had forgotten to take into account the labour and trouble which fell upon the defendants in their character of co-plaintiffs in the former suit. And lastly, he held that there was nothing gambling or speculative about the bargain.

In second appeal Mr. *Ram Prasad*, on behalf of the plaintiffs-appellants, contended that there was no labour and trouble incurred by the defendants in the former action; that the action was necessarily fought by the present plaintiffs who possessed all the information necessary for the successful conduct of the case, and who only were the persons who did all that was to be done in the way of employing and instructing counsel, bringing witnesses forward and the like. Mr. *Ram Prasad* also pointed out the inconsistency in the learned Judge's finding that the transaction was not of a gambling or speculative character, with the learned Judge's remarks, which was perfectly true, that the defendants stood to lose six hundred rupees, at least, in costs. Mr. *Ram Prasad* urged several forcible arguments in support of the finding that the bargain by

which the plaintiffs were to yield a thousand rupees' worth of land to the defendants as a recompense for the defendants' assistance in the suit, so far from being fair, was unconscionable, extortionate and unreasonable, as it has been held by the Court of first instance.

We think that this appeal must prevail. Mr. *Amir-ud-din* the learned counsel for respondents, argued that it should be remembered that his clients were not common money-lenders nor professional usurers, that they were related to, or connected with, the plaintiffs, and were consequently induced to run the heavy risk they incurred in helping the plaintiffs with their suit, the plaintiffs being unable to get help from any other quarter. The learned counsel also quoted certain rulings of the Calcutta Court in support of his argument. Those rulings are to be found in *Punchamun Musoomdar v. Doorga Nath Roy* (1), *Nobeen Chunder Ghose v. Ramgogenath Gope* (2), *Ramrao Khunderav v. Govind Pandshet* (3), and Woodman's Digest, page 699.

The learned Subordinate Judge, in his judgment, cited certain recent rulings of the Indian High Courts strongly in favour of his view of the case. Indeed, all the current of rulings upon cases of this character is against the respondent. Two cases have lately been before this Court, *Chuani Kuar v. Rup Singh* (4) and *Loke Indar Singh v. Rup Singh* (5), in which this question has been very fully and carefully considered, and all the case-law upon the subject was under the consideration of the Court. The circumstances of those two cases are very analogous to the circumstances of the case before us. In those cases, as here, the lender of the money for the purposes of maintaining the action, was not a common money-lender or a professional usurer. There also the receiver of the assistance was in extremely great need of help, having found it impossible to get assistance from any one but the person who lent him the money. In those cases also it was common ground that the persons who advanced the funds ran a very serious risk of losing their money. In those cases this Court decided that the contract,

(1) Weekly Reporter, 1864, 300. (2) W. R., 1864, p. 63.

(3) 6 Bom. H. C. Rep., 63.

(4) *Ante*, p. 57.

(5) *Ante*, p. 118.

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by which a large portion of the estate was conveyed to the person who advanced the money necessary to bring the action to recover the estate, was a contract which the Civil Court ought not to enforce. It was held, and we must hold here, that whether the contract be regarded as having been made under very risky circumstances, or whether it was made under circumstances of ordinary or inconsiderable risk, it would still be a contract open to objection under one or other of the conditions mentioned in s. 23 of the Contract Act. For, if it was a very risky contract, then obviously its enforcement would be against public policy on the ground of its being of a speculative character. If it was not of extraordinary risk, then it would be inequitable to enforce the contract, as the recompense secured was out of all proportion to the risk incurred. Approving of the rulings in those cases, we adopt and follow them in this case, and finding that the learned District Judge dissented from the Court of first instance for reasons which are not sustainable, we find that the contract, under which the defendants were to get half the plaintiffs' land in addition to other advantages in return for the pecuniary assistance afforded by them, was unfair, unreasonable and extortionate, and we think that the Court of first instance made a proper decision and decree in the case. We set aside the decree of the Lower Appellate Court, restore that of the first Court, and decree this appeal with costs.

*Appeal allowed.*

### PRIVY COUNCIL.

P. C.  
 J. C.  
 November  
 2 and 3,  
 1888.

HARI RAM AND ANOTHER (PLAINTIFFS) v. SHEODAYAL MAL AND ANOTHER (DEFENDANTS).

[On appeal from the High Court for the North-Western Provinces.]  
*Act VIII of 1871, Registration Act, ss. 28, 64, 65, 66—Place of registration of documents.*

The requirements of s. 28 of Act VIII of 1871 are fulfilled by the registration of a document relating to immoveable property in the office of the Sub-Registrar within whose sub-district any portion of the property is situate. The words "some portion

Present: LORD FITZGERALD, LORD HOBHOUSE, and SIR R. COUCH.

of the property" are not to be read as meaning some substantial portion of the property. All matters of publicity which it is the object of a register to afford are provided for in this respect by the carrying out of the provision of ss. 64, 65 and 66.

APPEAL from a decree (9th January 1885) of the High Court (1) reversing a decree (24th December 1884) of the District Judge of Gorakhpur.

The question here was whether a mortgage-deed, dated 20th May 1873, had been sufficiently registered, with reference to the requirements of s. 28 of Act VIII of 1871, having been presented for registration, and registered at the office of a sub-registrar in a sub-district, within which part of the property mortgaged was situate, that part having borne a very small proportion to the rest of the property.

That section (2) directs presentment for registration in the office of a sub-registrar within whose sub-district the whole, or some portion of the property, to which such document relates, is situate.

By the mortgage-deed of 20th May 1873, Mr. R. P. Brooke, after recitals that he owed to Hari Ram and Raja Ram (the present plaintiffs) Rs. 2,59,594, and that it had been agreed that he should draw upon them down to October 1873 to the further amount of Rs. 90,000, mortgaged to them his indigo factories and villages in the Gorakhpur district, also agricultural land in Champaran, and a plot of land, 500 yards square, in one of the mohallas in the town of Patna. This instrument was registered in the sub-registrar's office at Patna. Transactions continued between Brooke and the mortgagees, who were bankers in Patna, and who supplied him with funds, and the balance due was reduced. But in January 1875 Brooke sold his interest in the already-mortgaged estate to Sheodial Mal and Hardial Mal.

This suit was brought on the 1st June 1878 by Hari Ram and Raja Ram to recover from Brooke Rs. 79,655, alleged to be due on balance of accounts, and to realize that sum by sale of the property mortgaged by him to the plaintiffs; also, to have declared invalid as

(1) Reported I. L. R., 7 All., 590.

(2) Not differing in this respect from s. 28 of Act III of 1877, the Indian Registration Act, 1877.

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1888      being fraudulent and collusive, the sale of the property made by  
 HARI RAM      Brooke to Sheodial Mal and Hardial Mal, who were made the  
 v.      second and third defendants.  
 SHEODIAL       
 MAL.

The latter, filing their written statements in 1879, set up limitation, and relied upon the sale to them. The first defendant Brooke who was absent from India when the suit commenced, returning in 1881, admitted settlement of account, claiming certain deductions, and denied his personal liability.

Unless the instrument of 20th May 1873, having been effectively registered, could be taken as admissible in evidence, the debt on the account stated would have been barred by lapse of time. The District Judge, however, found that the plaintiffs were entitled to recover the balance due to them under the mortgage-deed, and decreed to the plaintiff the amount claimed, less Rs. 15,104. He found that Brooke was the owner of the plot of land in Patna, and that, therefore, the mortgage had been properly registered in the sub-registrar's office at Patna.

The defendants, Sheodial Mal and Hardial Mal, appealed from this decree to the High Court, which on the 9th January 1885, reversed it on the ground that the existence of property worth about Rs. 500 in Patna did not, within the true meaning of section 28 of Act VIII of 1871, entitle the plaintiffs to have the mortgage-deed which had been registered in the sub-registrar's office at Patna, considered to have been effectively registered as a document relating to estate of a different nature and far more valuable, in fact, constituting the mortgaged estate in Gorakhpur and Champaran. The decree of the High Court dismissed the suit.

The judgment is given in the report of the hearing on appeal to the High Court, at page 592 of the 7th vol. of the Indian Law Reports.

The plaintiffs appealed to Her Majesty in Council.

On this appeal,

Mr. J. Graham, Q.C., and Mr. J. H. A. Branson, for the appellants argued that the High Court had erred in holding that the

mortgage-deed of 20th May 1873 had not been duly registered as required by section 28 of Act VIII of 1871, both that Court and the Court below having found that some portion of the property, to which the deed related, *viz.*, Brooke's property in Patna, was situate within the Patna sub-registrar's sub-district. They referred to ss. 64, 65 and 66, and the provision made for the forwarding of copies of the document, endorsement, and certificate to the registrar of every district, and the sub-registrar of every sub-district in which any part of the property might be situated, as securing the publicity which was one of the main objects of the Act, as observed in the judgment of the High Court.

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Mr. T. H. Cowie, Q.C., and Mr. R. V. Doyne, for the respondents, without relying on the proposition expressed in the judgment of the High Court that "portion" meant substantial portion, as that word was used in s. 28, contended that the registration was defective with reference to the entire disconnection between such property on the one hand, as the indigo factory in Gorakh, pur, constituting, with the other agricultural land in Champaran the actual security given, and, on the other, the few yards of land in the town of Patna.

In regard to the merits of the suit, they also contended that the decree should be upheld on the evidence of satisfaction of the mortgage debt, examining the accounts for that purpose.

Counsel for the appellants were not called upon, either to reply as to the question of registration or to argue the subsequent matter of the accounts.

Their Lordships' judgment was delivered by SIR R. COUCH.

SIR R. COUCH.—The suit which is the subject of this appeal was brought by the plaintiffs, who are bankers, against the present respondents, who are also bankers, and against a Mr. Brooke. The plaintiffs, the appellants, sought to recover a sum of Rs. 79,655 as principal and interest, which they alleged to be due to them in respect of a mortgage executed by Brooke on the 20th of May 1873, the plaintiffs alleging that at that date Brooke adjusted his account and executed



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a mortgage for securing Rs. 3,49,504-4. There is no question that this mortgage was executed by Brooke. The mortgage stated that there had been an adjustment of accounts between Brooke and the plaintiffs, and it was given to secure the money which was then due on the account, together with a sum of Rs. 90,000 to be advanced by the plaintiffs to Brooke for defraying necessary expenses of an indigo concern from May 1873 to October of the said year. The defence of the present respondents, with whom alone their Lordships have now to deal, was twofold. Having become the purchasers of part of the mortgaged property, another part of it having been previously sold, they objected that this mortgage of May 1873, was not duly registered; and they have also objected that the whole of the sum of Rs. 90,000 was not advanced before the 1st October 1873, but a portion only was advanced, leaving a sum of about Rs. 30,000, which they say was subsequently advanced and is therefore not covered by the mortgage.

With reference to the objection as to the non-registration of the mortgage-deed, it appears from the schedule to the deed that it was a mortgage of a considerable property, only a portion of which, stated to be 500 yards of land built upon, was situate in the district of Patna; the other part, and of course much the largest part of the property, was situate in other districts. Act VIII of 1871, with regard to registration, contains this provision in s. 28:—"Save as in this part otherwise provided, every document mentioned in s. 17, clauses 1, 2, 3 and 4, and s. 18, clauses 1, 2, 3 and 4, shall be presented for registration in the office of a sub-registrar, within whose sub-district the whole or some portion of the property to which such document relates is situate." And this was an instrument which came within the provisions of this section. The registration was made in the district of Patna, where the 500 yards of land was situate. The Subordinate Judge held that this was a sufficient registration. On appeal to the High Court the learned Judges of that Court, the Chief Justice and another Judge, held that it was not; and the ground upon which they came to that decision is stated by the Chief Justice to be this:—"In a case

like the present, in which there is a large and valuable property in one sub-district and another small piece of land situate at a distance, it seems to me that to allow registration of a document affecting both properties in the place where the smaller and less valuable is situate would be inconsistent with the implied intention of the Legislature that registration should be made with reference to the locality of the property,"—that a literal interpretation of the terms of the section ought not to be adopted ; and that it was the intention of the Legislature that the registration should take place where some substantial portion of the property was situate.

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It appears to their Lordships that this judgment puts a construction upon s. 28 which cannot be supported, and, in fact, imputes to the Legislature an intention which does not appear, from the provisions of the Registration Act, to have been their intention. The words, if we take them in their ordinary sense, "within whose district the whole or some portion of the property, to which such document relates, is situate," certainly do not show an intention that there should be any inquiry as to whether the place where the document was registered was the place where, what may be called, some substantial portion of the property is situate ; and an inquiry of that kind might very frequently lead to considerable difficulty. But the intention of the Act is apparent from the subsequent provisions. In s. 64 it is provided that "every sub-registrar, on registering a document relating to immoveable property not wholly situate in his own sub-district, shall make a memorandum thereof and of the endorsement and certificate thereon, and send the same to every other sub-registrar subordinate to the same registrar as himself in whose sub-district any part of such property is situate ;" and then, "such sub-registrar shall file the memorandum in his book, No.1." S. 65 and s. 66 contain similar provisions where the property is situate in more districts than one. Thus, the information is conveyed to the registrars or sub-registrars of every place where the document ought to be registered, and thus all the information which it is the object of a register to afford is to be found in those different places. It appears to have been the intention of the Legisla-

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ture in making those provisions that it should be sufficient that the registration be made by the parties, as is stated in s. 28, in the place where some portion of the property—not a substantial portion, but where any portion of the property is situate, leaving it to the office to do the rest. These provisions are calculated to effect that, and are in accordance with what might reasonably be supposed to be the intention of the Legislature.

Their Lordships, therefore, are of opinion that the decision of the High Court, with regard to the want of registration of this mortgage, cannot be supported. The consequence ordinarily would be that the decree of the High Court reversing the decree of the Judge of Gorakhpur, which was given in favour of the plaintiffs, would be reversed, and the decision of the Judge of Gorakhpur would stand. But their Lordships allowed the learned counsel for the respondents to submit to them, and argue that the decision of the Judge of Gorakhpur was wrong, and consequently that, although the High Court had reversed it on a ground which cannot be supported, still it ought to be reversed, and the decree reversing it ought to stand.

Now, it is to be observed that the Judge of Gorakhpur had very carefully considered the whole of the case, and had come to the conclusion that the balance which he found due to the plaintiffs, and which they were entitled to recover as mortgagees, was really due to them. The objection taken to his finding appears to be of a two-fold character. It is said that only monies which had actually been advanced by the plaintiffs before the 1st of October 1873 can be recovered by the mortgagees, and that the advances out of the Rs. 90,000, subsequent to that day, did not become the subject of the mortgage. That depends upon the construction of the mortgage-deed. Their Lordships think that the mortgage was intended to cover the whole advance of the Rs. 90,000 ; and whether it was advanced before the 1st of October 1873 or not, if the parties, that is, Mr. Brooke and the mortgagees, thought fit between themselves to allow a portion

of that Rs. 90,000 not to be immediately advanced, but to remain in the hands of the plaintiffs in a deposit account in such a way that he could draw upon them and obtain the money at any time, that it was really covered by the mortgage, and it is not an answer to the claim of the mortgagees in respect of the Rs. 90,000, that the whole of it was not advanced before the 1st October 1873. The way in which the defendants seek to avail themselves of this objection is that they say that if they are right in that contention, and the mortgage only covered what was actually advanced before the 1st of October 1873, the accounts show that the whole of the mortgage was satisfied, and consequently that the plaintiffs are not entitled to recover upon it as they claim. Their Lordships think that this cannot be allowed.

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Then it is also contended that this money was not advanced. Mr *Mayne* has argued that there is no evidence of it, but one of the defendants when examined said he did not deny that the money was advanced ; and there cannot be any doubt the money was actually advanced.

Another answer to this contention on the part of the defendants appears to be this : On the 17th of September 1874, Mr. Brooke, the mortgagor, settled an account with the plaintiffs, and the whole of the matters between them was gone into, and a balance was then agreed upon as due from him to the plaintiffs, including all these different items which would be the subject of the mortgage. The defendants acquired no interest in the estate till January 1875, when they took a conveyance from Brooke. Their Lordships are of opinion that the defendants are bound by the account which Mr. Brooke so settled, and that what he, when he settled that account, agreed to be due in respect of the mortgage, and the way in which the different payments appear to be appropriated, cannot be now disputed. They do not think it necessary to go into the evidence which Mr. Cowie, and Mr. Mayne more especially, have referred to on this subject ; but they think that if that evidence was gone into, it would support the contention of the plaintiffs that the amount which the Judge of Gorakhpur has found to be due is really due to the

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plaintiffs, and is the subject of the mortgage, and the plaintiffs are entitled to recover it as mortgagees in the way in which they claim.

The case appears to have been very carefully investigated by the Subordinate Judge, and unless their Lordships could see that he was wrong in the way he has dealt with the accounts, and the various facts in the case, they would not come to the conclusion that his decree ought to have been reversed by the High Court. The result is that their Lordships will humbly advise Her Majesty that the decree of the High Court should be reversed, and the appeal thereto dismissed with costs, and the decree of the Judge of Gorakhpur varied by omitting that part of it which directs the deed of sale to be cancelled. The costs of this appeal will be paid by the respondents

*Appeal allowed.*

Solicitors for the appellants : Messrs. *Watkins and Lattey.*

Solicitors for the respondents : Messrs. *Barrow and Rogers.*

1888  
*November 7.*

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

MURLIDHAR AND OTHERS (PLAINTIFFS) v. KANCHAN SINGH  
AND OTHERS (DEFENDANTS). \*

*Mortgage—Conditional sale—Foreclosure—Suit for possession—Regulation XVII of 1806, s. 8—Cause of action—Limitation—Act XIV of 1859, s. 1(21).*

A suit for foreclosure was brought in 1886 upon a mortgage by conditional sale executed in 1846, the condition being for payment within five years from that date. The deed provided that, in default of payment within the prescribed period, the property mortgaged "will be foreclosed (*baibat*), and this mortgage-deed will be considered as an absolute sale-deed." Between 1846 and 1886 no foreclosure proceedings or other steps were taken by the mortgagee, and no admission of liability was made by the mortgagor.

*Held that*, by reason of Act XIV of 1859 (Limitation Act), the plaintiff's remedy was barred during the currency of that Act, and that the time within

\* Second Appeal No. 653 of 1887 from a decree of W. Blennerhasset, Esq., District Judge of Cawnpore, dated the 6th January 1887, confirming a decree of Munshi Kalwant Prasad, Subordinate Judge of Cawnpore, dated the 6th May 1886.

which he was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863.

*Held* also, that, even if foreclosure proceedings, under Regulation XVII of 1806, had been taken, the cause of action was the original non-payment of the money on the due date, and the provisions of the Regulation could not create a fresh cause of action. *Demonath Gangooly v. Nursingh Proshad Dass* (1) referred to.

THIS was a suit for foreclosure of a deed of mortgage by conditional sale executed on the 4th of February 1846, by the predecessor in title of the defendants in favour of the ancestor of the plaintiffs. The deed was as follows:—

“Musammat Kishen Kuar, widow of Shankar Bakhsh, deceased zamindár of mauza Kakadeo, &c., pargana, Jajmau, having presented herself in the Cawnpore Registration Office, solemnly and truly declared that she is in possession and enjoyment of a 4 pies 11 krants share in each of the villages Kakadeo and Benaikpur, pargana Jajmau, and that there was not and is not any other sharer, partner or claimant in the said share belonging to her at the time of the execution of the present deed. Now she has voluntarily and willingly mortgaged the said share in its entirety together with all the boundaries and rights, barren and waste lands, *jhil* and *jhabar*, *jalkar* and *bankar* lands, ponds and groves and trees both bearing and not bearing fruit, *sair* and saltpit and other zamindari dues appertaining thereto, bounded as below, for Rs. 200 of the *kuldar* coin, the half of which amounts to Rs. 100 of the same coin, to Shitab Rai, son of Panjab Rai, caste *Kayarth*, for a term of five years as a conditional sale, and does hereby promise to repay the said sum with interest at Re. 1 per cent. per mensem within the said term without any objection or excuse, and that during the said term of mortgage, she, the mortgagor, will remain in possession and will make the collections and will bear the profit and loss and be responsible in civil and criminal cases, and the mortgagee shall have nothing to do with them. But if she fail to pay the principal with interest, then after the expiration of the period specified herein, the aforesaid share will be foreclosed (*baibat*) in lieu thereof, and this

(1) 14 B. L. R., 87.

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1888 mortgage-deed will be considered as an absolute sale-deed. I have, therefore, written these few lines by way of mortgage as a conditional sale to serve as an authority.”

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No foreclosure proceedings were taken in respect of this deed under Regulation XVII of 1806. The present suit was instituted on the 7th October 1886 in the Court of the Subordinate Judge of Cawnpore, and the plaintiffs claimed foreclosure in default of payment of Rs. 1,151, the amount which they alleged to be due, as principal and interest under the deed.

The only plea of the defendants, in answer to the suit which it is necessary to notice, was that the suit was barred by limitation. Upon this the Subordinate Judge observed:—

“Although there was a time fixed in the deed of mortgage for payment of the loan, which time has long elapsed, yet at the time of the execution of the mortgage, or while Act XIV of 1859 or Act IX of 1871 was in force, no period was fixed for the presentation of an application for foreclosure, for which proceedings then used to be taken under Regulation XVII of 1806—see *Buldeen v. Golab Koonwer* (1). The ruling referred to by the pleaders for the defendants, *Ram Chunder Ghosaul v. Juggut Monmohiney Dabee* (2) does not seem to be applicable. Besides this, the Court must follow the rulings of the Allahabad High Court, and hold that the plea of limitation does not affect the claim.”

On the merits, however, the Subordinate Judge was of opinion that there was no consideration for the deed of the 4th February 1846, and accordingly dismissed the suit. The plaintiffs appealed to the District Judge of Cawnpore, whose judgment on the appeal was as follows:—

“The claim is for foreclosure on a conditional deed of sale alleged to be executed on the 4th February 1886, the term for payment being five years, and it is clear that for forty years the plaintiff has made no claim, and the defendant has not in any way admitted the correctness of the mortgage. It appears to me that, previous to Act XIV of 1859, the plaintiff would have been bound

(1) N.-W. P. H. C. Rep., 1867, p. 102.

(2) I. L. B., 4 Calc., 283.

to take foreclosure proceedings within twelve years from his cause of action. See Regulation III of 1793, and *Prannath Roy Chowdry v. Rookea Begum* (1). 1888

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“I can find nothing in Act XIV of 1859 operating to change this period of limitation, and the ruling quoted by the Lower Court in the appellant’s favour insists on the necessity of such admissions in order to extend the period of limitation. Accordingly, I find the suit barred by limitation. It is unnecessary to determine the remaining grounds of appeal. Appeal dismissed with costs.”

The plaintiffs appealed to the High Court.

Babu *Jogindro Nath Chaudhri* for the appellants.

Munshi *Kashi Prasad* and Pandit *Sundar Lal* for the respondents.

EDGE, C.J., and TYERRELL, J.—This was a suit for foreclosure of a mortgage by way of conditional sale executed on the 4th February 1846, the condition being for payment within five years of that date. The suit was brought in October 1886, and the Judge below has found that no claim was made by the mortgagees for forty years and that there was no admission of liability by the mortgagor during that period. The Judge, we think, rightly held that, by reason of Act XIV of 1859, the plaintiff’s remedy was barred during the currency of that Act. In that view we agree with him. In our opinion the time within which the plaintiff was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863. A great deal of the argument before us was directed to show that the cause of action, in a case like this, arose not on the non-payment at due date, but on the expiration of the year of grace provided for by Regulation XVII of 1806. It now appears that no proceedings were taken under that Regulation at all. But, even if they had been taken, we should be prepared to hold that the cause of action was the original non-payment of the money on the due date, and that the provisions in Regulation XVII of 1806, which was passed for the protection of mortgagors, could not create a fresh cause of action. To hold, as was contended before us, would involve

(1) 7 Moo. I. A., 323.



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this absurdity, that the non-compliance by an alleged mortgagor with the *parwana* obtained *ex parte* by an alleged mortgagee would create a cause of action whether there had been a mortgage or not. As far back as 1874, Mr. Justice Markby, in an elaborate judgment, decided that foreclosure proceedings under the Regulation in question did not create a cause of action: *Denonath Gangooly v. Nursingh Proshad Doss* (1). The appeal must be dismissed with costs.

*Appeal dismissed.*

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 November 10. Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.

**BALKISHAN AND ANOTHER (DEFENDANTS) v. KISHAN LAL**  
 (PLAINTIFF). \*

*Pending suits—Malikana—Recurring liability—Different reliefs claimed—Res judicata—Different subject-matters claimed—Judgment in first suit going to root of plaintiff's title—"Final" judgment—Judgment liable to appeal or under appeal—Effect of final decree in first suit pronounced subsequent to decision in second suit of Lower Appellate Court, but before hearing of second appeal in second suit—Civil Procedure Code, ss. 12, 13, 582, 587, 647.*

The pendency of litigation regarding rent, *malikana*, or other demand for one year, does not, under s. 12 of the Civil Procedure Code, bar a suit between the same parties in which the same demand is made for a subsequent year, inasmuch as the reliefs claimed in the two cases are different. Ss. 12 and 13 of the Code compared.

For the purposes of the rule of *res judicata* it is not essential that the subject-matters of the present and the former litigations should be identical. Where a recurring liability is the subject of claim, a previous judgment dismissing a suit between the same parties upon findings which do not go to the root of the title on which the claim rests, but relate merely to a particular item or instalment, cannot operate as *res judicata*. But if such previous judgment negatives the title and main obligation itself, the plaintiff cannot re-agitate the same question of title by claiming a subsequent item or instalment. *The Raja of Pittapur v. Sri Raja Rau Buchi Sittaya Garu* (2) referred to.

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\* Second appeal, No. 806 of 1887, from a decree of Saiyid Farid-ud din Ahmad, Subordinate Judge of Agra, dated the 27th November 1886, confirming a decree of Babu Alopi Prasad, Munsif of Mathura, dated the 21st August 1886.

(1) 14 B. L. R., 87.

(2) L.R., 12 I. A., 16.

A judgment liable to appeal or under appeal is only a provisional and not a definitive or final adjudication, and cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. Explanation IV of s. 13 of the Civil Procedure Code, commented on. *Sri Raja Kakarlapudi Suriyanarayanarazu v. Chellamkuri Chellamma* (1) and *Nilvaru v. Nilvaru* (2) referred to.

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The rule of *res judicata* contained in s. 13 of the Code applies equally to appeals and miscellaneous proceedings as to original suits. Having regard to its main object, so far as it relates to the re-trial of an *issue*, it refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue. Where, after the commencement of the trial of an issue, a final judgment upon the same issue in another case is pronounced by a competent Court (the identity of parties and other conditions of s. 13 being fulfilled), such judgment operates as *res judicata* upon the decision, original or appellate, of the issue in the later litigation.

On the 17th August 1885 a suit was instituted for recovery of an annual *malikana* allowance for the years 1290, 1291 and 1292 fasli. On the 5th October 1885 the Munsif dismissed the suit. On the 10th March 1886, the Subordinate Judge on appeal reversed the Munsif's decree, and decreed the suit. On the 21st June 1886 the defendant appealed to the High Court, which, on the 4th July 1887, reversed the Subordinate Judge's decree and restored that of the Munsif, on the ground that the plaintiff had never received and was not entitled to *malikana*. Meanwhile, on the 8th June 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 fasli, which accrued after the institution of the former suit. By judgments dated respectively the 21st August and 27th November 1886, the lower Courts decreed this suit, holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, operated as *res judicata*, and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May 1887 the defendant appealed to the High Court, and on the 16th May, 1888, (the High Court having, in the interval, dismissed the former suit by its judgment of the 4th July 1887), the appeal came on for hearing.

*Held* (1) that the trial of the present suit by either of the lower Courts was not barred by s. 12 of the Civil Procedure Code by reason of the fact that, at the time of such trial in August and November 1886, the previous litigation between the parties was pending in second appeal before the High Court.

(ii) that the lower Courts were wrong in holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, which, at the date of the institution of the present suit on the 8th June 1886 was liable to appeal, and, at the dates of the decisions of those Courts in August and Nov-

(1) 5 Mad. H. C. Rep., 176.

(2) I. L. R., 6 Bom., 110.

1888      ember 1886 was the subject of a second appeal pending in the High Court, could operate as *res judicata* in favour of the plaintiff's title to *malikana*.  
 BALKISHAN      (iii) That the High Court's judgment dismissing the former suit on the  
 v.      4th July 1887, though passed after the decisions of the lower Courts in the  
 KISHAN LAL.      present suit and after the institution of the second appeal in the present suit, was nevertheless binding on the High Court in deciding such second appeal, and, being final, was conclusive as *res judicata* against the plaintiff's title to *malikana*.

(iv) That the effect of the High Court's judgment dismissing the former suit on the 4th July 1887 was not affected by the circumstance that the second suit was brought for recovery of *malikana* for a different year, inasmuch as that judgment went to the root of then plaintiff's title to *malikana*, and its scope was not limited to the particular item then claimed.

THIS was a second appeal which came for hearing originally before Straight and Mahmood, JJ., who directed that it should be laid before the Chief Justice with a view to ultimate disposal by a Bench of three Judges. The facts are stated in the following order of reference:—

MAHMOOD, J:—In order to render the questions of law which arise in this case intelligible, it is necessary to state the following facts:—

The plaintiff, Pandit Kishna Lal, is the purchaser of the rights and interests of one Bhagwanta, who is alleged by him to have possessed zamindari rights in the village.

The defendants-appellants are muafidars of the village and, as such, in possession thereof. The plaintiff's contention is that the aforesaid Bhagwanta, whom he now represents was entitled to a *malikana* allowance of Rs. 12 per annum recoverable from the defendants in their capacity of muafidars.

Upon these allegations the plaintiff instituted a suit against the defendants on the 17th August 1885 for recovery of a sum of Rs. 30 as *maukana* allowance due in respect of 1290 F., 1291 F., 1292 F., but the suit was dismissed by the Munsif of Mathura on the 5th October 1885. Upon appeal preferred on the 7th February 1886, the Subordinate Judge of Agra (Babu Promoda Charan Banerji) reversed the Munsif's decree and decreed the claim on the 10th March 1886. The Subordinate Judge's decree was, however, appealed to this Court, the appeal having been preferred on the 21st June

1886, and was numbered as second appeal No. 973 of 1886, and it came on for hearing before Mr. Justice Oldfield, who, by his order of the 14th February 1887, remanded the case under s. 566 of the Code of Civil Procedure for trial of certain issues enunciated in that order. 1888  
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In pursuance of that order findings were recorded by the new Subordinate Judge (Babu Kashi Nath Biswas) on the 25th April 1887, and those findings came on before me along with the case for final disposal, and by my order of the 4th July 1887, I reversed Babu Promoda Charan's decree of the 10th March 1886 and restored the Munsif's decree of the 5th October 1885, whereby the plaintiff's suit had been dismissed.

Thus ended the plaintiff's suit for the recovery of *malikana* in respect of the years 1290, 1291 and 1292 F., the effect of the adjudication (speaking generally) being that the plaintiff had never received the *malikana* allowance and was not entitled thereto.

Meanwhile the plaintiff, relying probably upon Babu Promoda Charan's appellate decree of the 10th March 1886, instituted this suit on the 8th June 1886, upon allegations similar to those on which the former suit proceeded, this suit being for recovery of Rs. 12, *malikana* allowance for the year 1293 F. The suit was resisted, so far as the merits are concerned, upon allegations similar to those on which the defence in the former suit proceeded. But in addition, it was pleaded by the defendants that an appeal from Babu Promoda Charan's decree of 10th March 1886 was, at the time when such defence was made, pending in this Court, and that, therefore, the trial of the present suit was barred by s. 12 of the Code of Civil Procedure.

On the other hand, the plaintiff contended that the judgment of Babu Promoda Charan, dated the 10th March 1886, furnished a basis for holding that the plaintiff's right to recover the *malikana* allowance was *res judicata*, entitling the plaintiff to the benefit of conclusiveness and to a decree for the amount which he claimed in the present suit.

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The Court of first instance disallowed the defendant's contention in respect of s. 12 of the Civil Procedure Code upon the ground that the plaintiff's present claim was not barred by that section because it related to a year (1293 fasli) later than the years to which the former litigation related. But that Court, accepting the contention of the plaintiff as to the conclusive effect of Babu Promoda Charan's appellate decree of the 10th March 1886, passed in the former litigation, held that the judgment furnished conclusive proofs of the plaintiff's right to the *malikana* allowance and barred the retrial of that issue for the purposes of this suit, and upon this ground alone that Court decreed the suit on the 21st August 1886. The view of the law upon which that judgment proceeded was affirmed by the Lower Appellate Court, which also declined to enter into the merits of the case, feeling itself bound by Babu Promoda Charan's decree of the 10th March 1886, i.e., the decree which I have already stated was reversed by this Court on the 4th July 1887.

The decree of the Lower Appellate Court in this case relates to an appeal which had been preferred to that Court on the 13th September 1886, and that appeal was dismissed by that Court on the 27th November 1886.

It is from this lastmentioned decree that this second appeal was preferred to this Court on the 17th May 1887, and, being valued at less than Rs. 100, it came on for hearing before me, sitting as a single Judge, for disposal of such cases under the Court's rules of the 11th June 1887, and it was under those rules that, by my order of the 28th April 1888, I referred the case to a Division Bench consisting of two Judges, and the case has accordingly been heard by my brother Straight and myself under the learned Chief Justice's order of the 1st May 1888.

In my opinion the case raises grave questions of law with reference to s. 12 of the Code of Civil Procedure, as also to the rule of *res judicata* as defined in s. 13 of that Code, and it is with the approval of my brother Straight that I think that the case is a fit one to be referred for disposal to a Bench consisting of three Judges,

and with this recommendation I direct that the case be laid before the learned Chief Justice for such orders as he may deem fit to pass thereon as to the constitution of the Bench which is to dispose of the case.

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I may, however, add that somewhat cognate questions were considered by the learned Chief Justice and myself in the case of *Musammat Shakina Bibi v. Sheikh Amiran and others* (1) and by my brother Straight and myself in *Mussamat Amman Bibi v. Rai Morari Das* (2), and that, in my opinion, the exact effect of these cases should be considered when this case comes on for hearing before a Bench of three Judges as proposed.

STRAIGHT, J.—I agree.

By an order passed by the Chief Justice on the 18th May 1888, the case was laid before a Bench consisting of Edge, C.J., and Straight and Mahmood, JJ.

Mr. *Amir-ud-din* for the appellants.

Pandit *Bishambhar Nath* for the respondent.

MAHMOOD, J.—The facts of this case, so far as they are necessary to indicate the points of law which arise therein, were set forth by me in my referring order of the 16th May last, and I need not repeat them now.

In the case of *Sita Ram v. Amir Begam* (3), I dwelt at some length upon the question whether the plea of *res judicata* was an estoppel properly so called, and as such a rule of evidence or simply a rule of procedure. I adopted the latter view, and the distinction has been duly recognised by the Indian Legislature, for we find *res judicata* enunciated, not in the Evidence Act but in the Code of Civil Procedure. S. 13 of that Code aims at enunciating the whole rule and the aim has been substantially achieved, though my judgment in the case cited and the judgment of West, J., in *Bholabhai v. Adesang* (4) and the judgment of Melvill, J., in *Nilvaru v. Nilvaru* (5)

(1) S. A., No. 51 of 1887, not reported. (2) F. A., No. 24 of 1887, not reported.

(3) I. L. R., 8 All., 324. (4) I. L. R., 9 Bom., 75.

(5) I. L. R., 6 Bom., 110.

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indicate illustrations of the difficulties which the wording of the section still leave open to doubt.

The present case furnishes another of these illustrations, and in dealing with it the most convenient course is to formulate the exact questions which have been raised in the course of the argument at the Bar. These questions seem to be the following :—

1. Was the trial of this "*suit*" either by the Court of first instance or by the Lower Appellate Court, barred by s. 12 of the Code of Civil Procedure, in consequence of the circumstance that the previous litigation between the parties was then pending in this Court as second appeal No. 973 of 1886, decided on the 4th July 1887 ?

2. Does this Court's judgment of the 4th July 1887 operate as *res judicata*, barring either the trial of this "*suit*" or of the "*issue*" as to whether the plaintiff is entitled to the *malikana* allowance which he failed to recover for the previous years in the litigation which ended in this Court's judgment of the 4th July 1887 ?

So far as the first of these questions is concerned, it is scarcely necessary to say that the rule contained in s. 12 of the Code of Civil Procedure forms no part of the rule of *res judicata*, though the reason upon which it is based is in some respects similar in principle to the doctrine of *res judicata*. The distinction between the two rules, however, is vast. The rule in s. 12 relates to matters *sub judice*, whilst the rule in s. 13 relates to matters which have passed into *rem judicatam*. The one bars only a "*suit*;" the other bars both the trial of a "*suit*" and of an "*issue*" subject to their respective conditions. Those conditions are not all the same in s. 12 as they are in s. 13, and the wording of the two sections as to the distinction is so clear that it is not easy to confound the two rules. Now, in s. 12 before the plea can operate as a bar, the second suit must not only raise the same issue as that in the former suit still pending, but it must be for "*the same relief*."

The former litigation sought recovery of the *malikana* allowance for the years 1290, 1291 and 1292 fasli. In the present case the relief prayed for is the recovery of *malikana* for the year 1293, fasli.

The “ *issue* ” as to the right of *malikana* is, no doubt, the same as that in the former litigation, but the relief is not the same for the cause of action is different and the subject-matter is the *malikana* for the year 1293 fasli, which accrued after the institution of the former suit. The object of the rule contained in s. 12 of the Code is to prevent Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject-matter and the same relief. The policy of the law is to confine the plaintiff to one litigation, thus obviating the possibility of contradictory verdicts by two or more courts in respect of “ *the same relief*.” For instance, if, in the present case, the earlier litigation had related to the *malikana* for 1293 fasli, the present “ *suit* ” would have been barred by s. 12 of the Code on account of the *pendency* of the earlier litigation. I use the word *pendency* as distinguished from that state of things when matters in controversy have passed the stage of *lis pendens* and have become *res judicata* by final adjudication.

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Under this view of the law, it is clear that the present “ *suit*,” which was instituted on the 8th June 1886 for the recovery of the *malikana* for 1293 fasli, was not barred under s. 12 of the Code in consequence of the previous suit which related to the *malikana* for the earlier three years, the relief prayed for not being the same. This view seems to me to be somewhat similar to the conclusions, if not also the principles, of the ruling of the Calcutta High Court in *Bissessur Singh v. Gunput Singh* (1). And I may add that it would be a most unsatisfactory rule of law to hold that the *pendency* of a litigation connected with the rent, *malikana*, or any other demand for one year should bar a suit for a subsequent year; for if such were the rule, the prolongation of the earlier litigation might result in barring the later suit by lapse of the limitation period.

The distinction which I have explained between the rule contained in s. 12 and the rule of *res judicata*, as enunciated in s. 13 of the Code, leads me to the second question as formulated by me, namely, whether the trial of the *issue* as to the plaintiff's right of *malikana*

(1) 8 C. L. R., 113.



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is barred as *res judicata* in consequence of this Court's judgment of 4th July 1887, which terminated the earlier litigation (S.A., No. 973 of 1886).

It was not disputed at the Bar that that judgment has become "*final*" within the meaning of s. 13 of the Code. The effect of that judgment was to reverse the Lower Appellate Court's decree of the 10th March 1886 and to dismiss the plaintiff's suit for the *malikana* of the previous years, to which that litigation related, upon the ground that the plaintiff had failed to prove his title to recover any *malikana* allowance.

Now, there can be no doubt that, for purposes of *res judicata*, it is *not* essential that the subject-matter of the litigation should be identical with the subject-matter of the previous suit of which the adjudication is made the foundation of the plea, which plea, as I have already said, is extensive enough to bar a suit as well as the re-trial of an *issue*. The distinction between the two aspects of the plea must not be lost sight of, for it is of special significance in case, of recurring liabilities such as the present. The general rule of law may be briefly stated to be that, where a recurring liability is the subject of a claim, a previous judgment, dismissing the suit upon findings which fall short of going to the very root of the title upon which the claim rests, cannot operate as *res judicata*, but if such previous judgment does negative the title itself, the plaintiff cannot re-agitate the same question of title by suing to obtain relief for a subsequent item of the obligation. The rule is recognised both in England and in America, and is well illustrated by the American writers. Mr. Bigelow, in his well-known work on the law of estoppels (p. 45), referring to cases in which there has been no supervenient change in relative position of the parties, goes on to say :—  
" Judgment based solely upon the validity of the demand and not upon facts in avoidance, such as payment or compromise, would doubtless operate as a bar. In the case of an action on a debt due by instalments, as for example on a promissory note, judgment against the validity of the main obligation itself would preclude the obligee from suing upon any of the instalments; but an adverse judgment

based upon grounds relating merely to a particular instalment sued upon could not in principle bar an action on another of them." 1888

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The same is the rule approved in Indian cases by the highest tribunals when such questions usually arise as to the amount of rent payable by the tenant, rent being, of course, a recurring liability. Perhaps the most important case, enunciating the principle that identity of the subject-matter of a suit is not an essential condition precedent to the applicability of the rule of *res judicata* is the case of *The Rajah of Pittapur v. Sri Rajah Rau Buchi Sittaya Garu* (1) where their Lordships of the Privy Council held, that, although the subsequent suit related to different property, a previous adjudication as to adoption, such adoption being a necessary element of the plaintiff's title, operated as *res judicata* barring the re-agitation and re-trial of the same issue in the subsequent litigation.

The principle seems to me to be fully applicable to the point argued in the present case, and I hold that if in the previous litigation any final adjudication as to the plaintiff's absence to title to receive *malikana* has been arrived at, the mere circumstance that that adjudication related to a claim of *malikana* for the earlier years will not prevent the application of the rule of *res judicata*.

This then is the first step leading to the real difficulty in the case. What has been argued for the plaintiff-respondent in this case is that on the 8th June 1886, when the present suit was instituted, there did not exist any such *final* adjudication as would bar the trial of the *suit* or the issue, for the Lower Appellate Court's decree of the 10th March 1886 in the former litigation was then still liable to second appeal, which appeal was indeed preferred on the 21st June 1886, that is, about a fortnight after the institution of the suits. It has been contended, on the basis of this circumstance, that the last sentence of Explanation IV of s. 13 of the Civil Procedure Code requires us to hold that the rule of *res judicata* is wholly inapplicable to this litigation, because the previous adjudication at the date of the action was not *final* for the purpose of the plea. At the same time, it has been contended on behalf of the plaintiff-respondent, as

(1) L. R., 12 I. A., 16.

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an alterantive argument, that if at the date of the institution of this suit the rule of *res judicata* was applicable thereto, the Lower Appellate Court's judgment in the previous litigation, namely, the judgment of the 10th March 1886 which decreed the plaintiff's suit stood unreversed and was, therefore, *final* for the purpose of *res judicata*; and that, therefore, both the Courts below acted rightly in dealing with that adjudication as *final* in favour of the plaintiff's right to *malikana* and in decreeing this suit, irrespective of this Court's judgment of the 4th July 1887, which, at the time of the institution of the present suit or at the time when the Courts below were dealing with this case, had not come into existence.

Upon these alternative arguments, it has been contended that one of two courses is open to us, either to uphold the Lower Court's decrees decreeing this suit or to set aside those decrees and remand the case for trial *de novo* on the merits under s. 562 of the Code of Civil Procedure, since both the Courts below, having dealt with the judgment of the 10th March 1886 as conclusive, have declined to try this suit upon the merits.

This argument raises two points for determination as matters of legal principle.

The first is, whether a judgment liable to appeal and which has not yet been appealed from, or an appeal from which is actually pending, can operate as *res judicata* during the interval preceding the appeal and the period during which the appeal is pending in a higher tribunal. This question distinctly arises in this case, because on the 8th June 1886, when this suit was instituted, Babu Promoda Charan's decree of the 10th March 1886 was liable to appeal and was actually appealed on the 21st June 1886.

I am of opinion that under such circumstances the decision of the 10th March 1886, on which both the Courts below have relied for applying the rule of *res judicata* as barring the trial of the *issue* as to the plaintiff's right of *malikana*, cannot be regarded as "*final*" within the meaning of s. 13 of the Code of Civil Pro-

cedure. The latter part of the Explanation IV of that section has been framed in somewhat unspecific language, and runs as follows:—

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“A decision, liable to appeal, may be final within the meaning of this section until the appeal is made.”

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The language of the section is silent as to what happens when an appeal has been preferred; and, no doubt, much depends upon the interpretation of two vague words “may” and “until” as they occur in the sentence which I have just quoted. I may perhaps say that more has been aimed at by that sentence than the few words of which that sentence consists could convey. What has been left unsettled by that sentence is the difficulty pointed out by a juristic Judge of such eminence as Mr. Justice Holloway of Madras, in *Sri Raja Kakarlapudi Suriyanarayanarazu Garu v. Chellamkuri Chellamma* (1) when that learned Judge said:—

“In the Lower Court it seems to have been taken for granted that the former judgment could not be conclusive because an appeal was pending. This is not in accordance with English law, as the judgment on the rejoinder in *Doe v. Wright* shows. It would, however, be perfectly sound doctrine in the view of other jurists (*Unger Oct. Priv. Recht*, II, 603, *Sav. Syst.*, 297, *Seq. Waihter*, II, 549). As an Englishman, I should be sorry to invite a comparison between the reasons given by these great jurists for their and those embodied in the English cases for the contrary doctrine.”

Not happening to be an Englishman myself, I may, though a member of the English Bar, respectfully regret that the learned Judge, in delivering his judgment, refrained from stating the comparison which he indicated. Such a comparison might have been useful in obviating the vagueness of the latter part of Explanation IV of s. 13 of the Civil Procedure Code, which vagueness has given rise to one of the difficulties in this case. And it is because of that difficulty that I feel myself free to put the best interpretation I can upon that sentence, so as to bring it in accord with what I regard as proper juristic reasons.

(1) 5 Mad. H. C. Rep., 176.

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I hold, so far as my knowledge of English law is concerned, that the point now under consideration is not settled by any long course of decision in England or India. Nor, as I have already indicated, has the Legislature, in framing Explanation IV of s. 13 of the Code of Civil Procedure, removed the doubt. As Mr. Justice Holloway has pointed out, the view of continental jurists is that judgments still liable to appeal and those that have actually been appealed from, the appeal being still pending, cannot operate as furnishing basis for the rule of *res judicata*. Pothier has devoted a whole chapter to the discussion of the subject (Law of Obligations, translated by Mr. D. Evans, vol. I, p. 534), and he points out that "a judgment to have the authority, or even the name of *res judicata*, must be a definitive judgment of condemnation or dismissal. A provisional condemnation then cannot have either the name or the authority of *res judicata*, for, although it gives the party obtaining it a right to compel the opposite party to pay or deliver provisionally the money or things demanded, it does not put an end to the cause, or form a presumption *juris et de jure* that what is ordered to be paid or delivered is due, since the party condemned after satisfying the sentence may be admitted in the principal cause to prove that what he was ordered to pay is not due," and consequently to obtain a revocation of the judgment. He then points out that judgments, still liable to appeal, stand, for the purpose of *res judicata*, on the same footing as provisional judgments, and that the effects of such judgments "are only momentary and cease as soon as an appeal is made. This is the case even where the sentence ought to be executed provisionally, notwithstanding the appeal, for such execution only gives the sentence the effect of provisional judgment, which, as we have already mentioned, have not the authority of *res judicata*."

I hold that the views thus expressed by Pothier and, as Mr. Justice Holloway has indicated, adopted by other continental jurists, as to the doctrine of *res judicata*, are consistent with the interpretation which I place upon Explanation IV of s. 13 of the Code of Civil Procedure in relation to the authority of judgments still liable

to appeal. Such judgments are not *definitive* adjudications. They are only *provisional*, and, not being *final*, cannot operate as *res judicata*. Such indeed seems to be the view adopted by the learned Judges of the Bombay High Court when they said, in *Nilvaru v. Nilvaru* (1), "We consider that when the judgment of a Court of first instance upon a particular issue is appealed against, that judgment ceases to be *res judicata* and becomes *res sub judice*."

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In this case, therefore, both the Courts below were wrong in law in holding that the previous judgment of the 10th March 1886, which at the date of the institution of this suit was still liable to appeal and which at the date of the decision of this suit by the first Court as also at the date of the decision by the Lower Appellate Court, was the subject of a second appeal pending in this Court (S. A., No. 973 of 1886) could operate as *res judicata* in favour of the plaintiff in regard to his title as to the *malikana*.

If the difficulty of the case rested here, the proper decision of this appeal would, of course, be to decree this appeal and, setting aside the decrees of both the Courts below, to remand the case to the Court of first instance for trial upon the merits. But the matter requires consideration of the effect of my judgment in the former litigation, dated the 4th July 1887. That judgment, as I have already said, did not exist when this suit was filed (8th June 1886); it did not exist when first the Court decreed the plaintiff's claim (21st August 1886); it did not exist when the appeal was preferred to the Lower Appellate Court (13th September 1886); it did not exist when the appeal was dismissed by the Lower Appellate Court (27th November 1886), on the ground of Babu Promoda Charan's decree of 10th March 1886 which was reversed by my judgment. Nor did my judgment exist when this second appeal was preferred (17th May 1887), the result being that both the appeal (S. A. No. 973 of 1886) in the former litigation and this appeal were pending at the same time in this Court till my judgment in the former case was passed on the 4th July 1887.

(1) I. L. R., 6 Bom., 110.

1888      The question then is, what are we to do *now* in this case? Are we  
 BALKISHAN      to accept my final judgment of the 4th July 1887 (which terminat-  
 v.      ed the former litigation) as *res judicata* for purposes of dismissing  
 KISHAN LAL.      this suit?

The question relates to the scope of the maxim *pendente lite nihil innovetur*. That the maxim governs alienations *pendente lite* cannot be doubted. Does it also relate to adjudications which have taken place during the pendency of one litigation in another litigation which, though commenced *before*, had not *terminated* when the present litigation was begun?

So far as I am aware, this exact question has not been settled by any definitely authoritative decision in England or in India. I am, therefore, not hampered by any case law on the subject, and feel myself free to adopt such views as I consider most consonant with legal principles.

It seems to me that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants, *ne autem lites immortales essent, dum litigantes mortales sunt*. This saying of Voet is in accord with the maxims *nemo debet bis vexari pro una et eadem causa*, and the broader maxim *interest reipublicæ ut sit finis litium*. This being so, the doctrine, so far as it relates to prohibiting the re-trial of an *issue*, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a *final* judgment pronounced meanwhile in such previous litigation by a competent Court (the identity of parties and other conditions being satisfied) should operate as *res judicata* preventing the Judge dealing with the later litigation from adjudicating differently. If this is not done, it seems to me that the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated. So far as the justification of this view from the provisions of the Civil Procedure Code is concerned, I may say that the rule contained in s. 13 is not

limited to the Courts of first instance, that it applies equally to the procedure of the first and second appellate Courts by reason of ss. 582 and 587 respectively, and, indeed, even to miscellaneous proceedings by reason of the general provisions of s. 647 of the Code.

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Applying these views to the present case, the argument for the plaintiff-respondent, whilst conceding that my judgment of the 4th July 1887 has become *final*, requires us either to hold, in spite of that judgment, that the plaintiff is entitled to the *malikana* right which that judgment negatived, or to remand the case for trial of an issue which in a litigation between the same parties has already been settled against the plaintiff by a *final* adjudication.

I do not think that either of the alternatives suggested on behalf of the plaintiff-respondent can be adopted. We cannot to-day, when we are called upon to decide the issue as to the plaintiff's right of *malikana*, ignore my *final* judgment of the 4th July 1887, which negatived that right in a previous litigation between the parties. Under the exigencies of the case, what the two lower Courts might have done is of no consequence, so far as the disposal of this appeal is concerned. They have acted irregularly in accepting Babu Promoda Charan's decree of 10th March 1886 as a *final* adjudication, which has already been shown to be wanting in the requisites of a final adjudication within the meaning of Explanation IV of s. 13 of the Code. But so far as we are concerned in this case, we cannot ignore my judgment of the 4th July, 1887, nor can we remand the case for re-trial of the very issue which that judgment *finally* decided against the plaintiff's right of *malikana*.

I do not think that the law contemplates any such results. And after full consideration of the matter, I am glad to agree in the view which I understood the learned Chief Justice and my brother Straight to be inclined to adopt at the hearing, that for the purposes of disposing of this appeal we must regard my judgment of the 4th July 1887 as conclusive against the plaintiff's right of *malikana* claimed in this suit, and that we should decree this appeal, and setting aside the decrees of both the Courts below, dismiss the suits with costs in all the Courts.



1888 I would order accordingly.  
 BALKISHAN EDGE, C. J.—I concur.  
 v. STRAIGHT, J.—So do I.  
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*Appeal allowed.*

*Before Mr. Justice Mahmood.*

1888 AJAIB NATH AND OTHERS (DEFENDANTS) v. MATHURA PRASAD  
 November 12. (PLAINTIFF). \*

*Pre-emption—Mortgage by conditional sale—Foreclosure—Regulation XVII of 1806—Suit by mortgagee for possession—Compromise and decree thereon—Mortgagee accepting part of the property in suit—Suit for pre-emption—Pre-emptor not asserting or proving validity of foreclosure proceedings—Pre-emptor's title referred to date of compromise and decree—Purchase-money—Acquiescence of pre-emptor in transfer.*

The mortgage under a deed of conditional sale executed in 1878 took foreclosure proceedings under Regulation XVII of 1806, and, the year of grace having expired, a foreclosure proceeding was recorded on the 18th September 1882, declaring the mortgage to have been foreclosed. In August 1885 the mortgagee instituted a suit for possession of the mortgaged property. On the 19th September 1885 the suit was compromised, the mortgagee accepting a part of the mortgaged property, and relinquishing the remainder. A decree was passed in the terms of the compromise. Subsequently a suit for pre-emption was brought against the mortgagor and mortgagee to enforce pre-emption in respect of the alienation. The plaintiff claimed to pre-empt the whole of the property to which the deed of 1878 related, including the portion relinquished by the conditional vendee under the compromise and decree of the 19th September 1885.

*Held* that although, upon the expiration of the year of grace, the ownership of mortgaged property vested in a conditional vendee, even though he might not have obtained a decree establishing or declaring his right, and the right of pre-emption accrued on the date when the conditional sale thus became absolute, yet foreclosure proceedings under the Regulation being of a purely ministerial character, were not conclusive or even *prima facie* evidence in a subsequent litigation against the conditional vendor that a valid foreclosure had been duly effected; that strict observance of the requirements of the Regulation were conditions precedent to the right of foreclosure; and that, in the present case, as the plaintiff had not asserted or attempted to prove that all those requirements had been fulfilled so as to result in an actual

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Second Appeal No. 1288 of 1887 from a decree of C. Mellor, Esq., District Judge of Gorakhpur, dated the 25th June 1887, modifying a decree of Maulv Shah Ahmad-ullah Khan, Subordinate Judge of Gorakhpur, dated the 23rd March 1887.

foreclosure and consequent accrual of pre-emption at the end of the year of grace, no foreclosure was shown to have taken place prior to the compromise of the 19th September, 1885, and the plaintiff's right of pre-emption accrued on and must be referred to that date, and consequently extended only to the property to which the compromise related, and the price payable by the plaintiff was the amount specified in the compromise. *Bhadu Mahomed v. Radha Churn Bolia* (1), *Sheodeen v. Sookit* (2), and *Tuwakkul Rai v. Lachman Rai* (3) distinguished. *Norender Narain Singh v. Dwarka Lal Mundur* (4), *Madho Prasad v. Gajadhar* (5), *Sitla Bakhsh v. Latta Prasad* (6), and *Jagat Singh v. Ram Bakhsh* (7) referred to.

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Acquiescence in a mortgage by conditional sale does not involve relinquishment of the right of pre-emption upon the conditional sale eventually becoming absolute.

The facts of this case are fully stated in the judgment of the Court.

The Hon. *T. Conlan* and *Munshi Ram Prasad* for the appellants.

*Mr. C. Dillon* and *Munshi Sukh Ram* for the respondent.

MAHMOOD, J.—All these appeals are connected together and have arisen out of the same set of facts and litigation.

In each of the villages Simra and Mahadewa three persons owned an eight pies share, and they executed three separate *bai-bil-wafa* mortgages in respect of their respective shares in both of the villages in favour of Sheodin Misr on the 15th June, 1878.

The first mortgagor was Sital (now represented by Bodil, Ram-charit and Bhagmani), the second was Binda Prasad and the third was Janki (now represented by Badri).

On the 22nd September, 1880, the mortgagee Sheodin took foreclosure proceedings under s. 8 of Regulation XVII of 1806 in respect of every one of the three mortgages, and the year of grace required by that Regulation having expired, a foreclosure proceeding was recorded on the 18th September, 1882, declaring the mortgages by conditional sale to have been foreclosed.

(1) 4 B. L. R., A. C., 219.

(4) L. R., 5 I. A., 18.

(2) S. D. A., N.-W. P., 1864, vol.

(5) L. R., 11 I. A., 186.

I., p. 624.

(6) I. L. R., 8 All., 383.

(3) I. L. R., 6 All., 344.

(7) Weekly Notes, 1887, p. 233.

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On the 20th August, 1885, the mortgagee Sheodin instituted three distinct suits for possession of the mortgaged properties, each suit relating to each of the three *bai-bil-wafa* mortgages above-mentioned, respectively. The suits were, however, compromised on the 19th September, 1885, and the learned Judge of the lower Appellate Court has found that "at the time of the compromise the amount of the debt due on the first bond (the original consideration of which was Rs. 782-4-0) had amounted to Rs. 1,051-8-0; similarly the debt due on the second bond (original consideration Rs. 595) amounted to Rs. 1,062, and that of the third bond (original consideration Rs. 461-7-0) amounted to the sum of Rs. 824-11-0. The compromise was to the effect that the vendee had accepted in each case 8 pies in mauza Simra and 4 pies in Mahadewa in full payment, and had agreed to release 4 pies of Mahadewa in each case. Decree was given in terms of the compromise."

The transactions above-mentioned have resulted in this litigation initiated by two sets of pre-emptors in respect of each of the three *bai-bil-wafa* mortgages above-mentioned.

The first set of pre-emptors are (1) Ajaib Nath, (2) Kunjbehari, (3) Brijmohan, who jointly instituted three separate suits in respect of each of the three alienations. These three suits were instituted on the 8th September, 1886, against the heirs of the conditional vendors and Sheodin, the vendee.

Similarly, on the 2nd November, 1886, Mathura Prasad instituted three rival suits for enforcement of pre-emption in respect of the same alienation.

There were thus two rival pre-emptive suits in respect of each alienation, and the rival pre-emptors were alternately impleaded as defendants to each other's suits—a procedure which is in conformity with the principles upon which the rulings of this Court in *Kashi Nath v. Mukhta Prasad* (1) and *Hulasi v. Sheo Prasad* (2) proceed.

The Court of first instance, in dealing with the contentions of the parties, held that the right of pre-emption as claimed could not accrue till foreclosure of the mortgage by conditional sale; that

(2) I. L. R., 6 All., 370.

(1) I. L. R., 6 All., 455.

“the foreclosure proceedings were in a state of suspense” till the mortgagee Sheodin obtained a decree for foreclosure on the compromise of 19th September, 1885; that since under that compromise foreclosure took place in respect of 8 pies share in Simra and only 4 pies share in mauza Mahadewa to the exclusion of the remaining 4 pies share in the latter village, which had been reserved by the compromise from foreclosure, such reserved 4 pies share was not subject to pre-emption. That Court therefore decreed the pre-emptive suit only in respect of 8 pies share in Simra and 4 pies share in Mahadewa, allotting three shares to the plaintiffs, Ajaib Nath, &c., and one share to their rival pre-emptor Mathura Prasad—a procedure in conformity with the ruling of this Court in *Jai Ram v. Mahabir Rai*(1) where it was held that where there are rival suits for pre-emption the rights of the rival pre-emptors are to be taken as equal *per capita* with reference to the number of the pre-emptors and not with reference to the extent of their shares in the village.

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As to the price payable by the pre-emptors, the first Court held that the full amounts due on the three mortgages at the time of the compromise of 19th September, 1885, furnished the proper standard of calculation.

In accordance with these findings the first Court decreed all the six suits, and, taking each couple of rival suits, framed decrees upon the principles explained by this Court in *Kashi Nath v. Mukhta Prasad* (2), enabling each set of rival pre-emptors to obtain a proportionate share of the pre-empted property, and in default of either set of pre-emptors, to pre-empt the whole property.

From the first Court's decrees no appeal appears to have been preferred to the lower appellate Court by the rival pre-emptor Mathura or by Sheodin, vendee, or by any of the vendors, and these parties must, therefore, be taken to have accepted the first Court's decree.

The pre-emptors Ajaib Nath, Kunjbehari and Brijmohun, however, appealed to the lower appellate Court, contending that the

(1) I. L. R., 7 All., 720.      (2) I. L. R., 6 All., 370.

1888. first Court had wrongly excluded the 4 pies of Mahadewa which had been reserved from foreclosure under the compromise of 19th September, 1885, from their pre-emptive claim; that the rival pre-emptor Mathura had by acquiescence lost his right of pre-emption; that the price found by the first Court was excessive, since the vendee Sheodin was entitled only to such as was due on the three *bai-bil-wafa* mortgages at the expiry of the year of grace, and not to any sum as interest for the subsequent period. On the other hand, Mathura, the rival pre-emptor, who was impleaded as respondent in all the six appeals, filed objections under s. 561 of the Civil Procedure Code, claiming a preferential right of pre-emption, and contending that the first Court should have allotted shares to the pre-emptors not *per capita*, but with reference to the extent of the shares of each pre-emptor in the village.

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The lower appellate Court disallowed all these contentions with the exception of that relating to the 4 pies share of Mahadewa in respect of which the first Court had dismissed all the pre-emptive suits. The lower appellate Court held that "as the conditional vendors failed to redeem within the year of the grace, the sales on the expiration of that year became absolute. From that moment the vendee could have claimed to be put in possession of the whole of the property entered in the conditional deed. The pre-emptor was entitled to claim whatever the vendee could claim, and it was out of the power of the vendor and vendee to make any change in the conditions of the contract which could affect the rights of the pre-emptor.

For this opinion the learned Judge relied on a ruling of the Calcutta High Court in *Bhadu Mahomed v. Radha Churn Bolia* (1) and an old ruling of the Agra Sadr Court in *Sheodeen v. Sookit* (2), which go to show that when pre-emption has once accrued, no subsequent dissolution of the sale can affect the pre-emptor's right of pre-emption. Following these rulings, the learned Judge decreed the three appeals of Ajaib and others (Nos. 32, 33, and 34) as far as they related to the reserved 4 pies of Mahadewa, and accordingly (1) 4 B. L. R., A. C., 219. (2) N.-W. P. S. D. A. Rep., 1864, Vol. I, p. 624.

modified the first Court's decrees in those three cases by declaring that Ajaib and others were entitled to get possession of three-fourths of 8 pies in Mahadewa and not of 4 pies only as decreed by the first Court.

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The three appeals of Ajaib, &c. (Nos. 29, 30 and 31) which had arisen from the suits in which their rival pre-emptor Mathura was plaintiff, were dismissed by the learned Judge with the exception of a small modification as to costs.

In this Court three sets of appeals have been preferred, each set consisting of three appeals.

Appeals Nos. 1288, 1290 and 1291 have been preferred by Ajaib and others, &c., and relate to the decrees in the three pre-emptive suits in which their rival pre-emptor Mathura was plaintiff. The second set of appeals, namely, Nos. 1286, 1287, 1289, have also been presented by them and relate to the decrees in the suits in which their rival pre-emptor Mathura was a defendant and they themselves were plaintiffs.

The third set of appeals, Nos. 1342, 1343 and 1344, have been preferred by the vendors and are restricted to complaining of so much of the lower appellate Court's decree as allowed pre-emption in respect of the 4 pies share of Mahadewa which had been expressly reserved for them by the compromise of the 19th September, 1885.

Such then being the nature of the entire litigation which these nine connected appeals present to me, and having heard them all, I think it will be convenient to dispose of the six appeals of Ajaib and others together, as they have been preferred upon the same grounds of appeal and raise the same points for decision. They are further connected together because in all of them the rival pre-emptor Mathura, being respondent, has preferred objections under s. 561 of the Civil Procedure Code, contending that his right of pre-emption is preferential to that of Ajaib and others, and the suits of the latter should therefore have been dismissed by the lower Courts.

The first and the most important question in the case, however, has been raised by the three appeals of the vendors, namely, appeals Nos. 1342, 1343 and 1344. The question is whether the lower

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appellate Court was right in holding that under the circumstances of this case the right of pre-emption could be claimed by either set of rival pre-emptors in respect of the 4 pies share in Mahadewa which had been released from the foreclosure by the mortgagee Sheodin under the terms of the compromise of the 19th September, 1885.

Mr. *Jogindro Nath Chaudhri* who has appeared on behalf of the appellants-vendors has argued that the original *bai-bil-wafa* mortgages of the 15th June, 1878, having been executed whilst Regulation XVII of 1806 was in force, those mortgages could not be foreclosed without due performance of the preliminary steps required by s. 8 of that Regulation, and a decree of Court rendering such sale absolute, that the foreclosure proceedings were therefore ineffective till the compromise of 19th September, 1885, and the decree passed thereon, and; that the compromise being thus conclusive and binding upon the mortgagors and the mortgagee, it also concludes the pre-emptors, and precludes them from claiming pre-emption in respect of the 4 pies share of Mahadewa which that compromise released from foreclosure and reserved for the mortgagors.

On the other hand, Mr. *Ram Prasad*, who has ably argued these cases on behalf of his clients *Ajaib* and others, has contended that a foreclosure decree is not a condition precedent to rendering a *bai-bil-wafa* mortgage absolute under Regulation XVII of 1806, and that such conditional sales became absolute *ipso facto* by the mere lapse of the year of grace after proceedings have been taken under s. 8 of the Regulation. Upon this contention the learned pleader argues that the foreclosure proceedings taken by the mortgagee Sheodin by his applications of the 22nd September, 1880, and which terminated in the foreclosure *rubkari* of 18th September, 1882, were sufficient to make the sales absolute at the expiry of the year of grace, that at that time the right of pre-emption accrued to the pre-emptors in respect of the *whole* of the properties, and such right of pre-emption could not be defeated or restricted by any subsequent act of the mortgagor and mortgagee such as the compromise of 19th Septem-

ber, 1885, and that therefore the vendors-appellants are precluded from questioning the propriety of the foreclosure proceedings of 18th September, 1882.

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I am of opinion that both these contentions go much too far in the direction at which they aim. In the case of *Tawakkul Rai v. Lachman Rai* (1) I stated my reasons and authorities for holding that on the expiration of the year of grace allowed by Regulation XVII of 1806, the ownership of the mortgaged property vests absolutely in the mortgagee, even though he might not have obtained a decree establishing or declaring his right, and that for purposes of pre-emption the date at which the conditional sale thus becomes absolute is the period of the accrual of pre-emption and cannot be effected by any foreclosure proceedings which may subsequent to such accrual be taken by the mortgagee. I still adhere to the same views, and while they, on the one hand, answer Mr. Chaudhri's contention as to the necessity of a foreclosure decree, they, on the other hand, preclude Mr. Ram Prasad's contention that foreclosure proceedings such as the *rubkar* of 18th September, 1882, are conclusive or binding in any sense upon the vendors when the question is litigated whether or not a valid foreclosure has taken place. Such proceedings are of a purely ministerial character, and far from being conclusive are not even *prima facie* evidence of foreclosure having been duly effected. This matter is settled by the ruling of the Privy Council in *Norender Narain Singh v. Dwarka Lall Mundur* (2). Again, their Lordships in *Madho Prasad v. Gajadkar* (3) have laid down that the provisions of s. 8 of Regulation XVII of 1806 are not merely *directory* but imperative as conditions precedent to the right of foreclosure itself. How strict an observance of those requirements is necessary has been well stated by my brother Straight in *Silla Bakhsh v. Lalta Prasad* (4) in observations with which I so entirely concur that they leave nothing for me to add.

Now such being the law, no attempt has been made by Mr. Ram Prasad's clients, Ajaib and others pre-emptors, either to assert or

(1) I. L. R., 6 All., 344.

(3) L. R., 11 I. A., 186.

(2) L. R., 5 I. A., 18.

(4) I. L. R., 8 All., 388.



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prove that in the foreclosure proceedings which ended in the *rubkar* of the 18th September, 1882, all the requirements of the Regulation were satisfied, so as to result in an actual foreclosure at the expiry of the year of grace. The Court of first instance disregarded those proceedings, holding them to be "in a state of suspense," which phrase I understand to mean that actual foreclosure had not taken place. I cannot help feeling that the learned Judge of the lower appellate Court in dissenting from the first Court's views upon this point had not present to his mind the exact and stringent requirements of the law of foreclosure under the Regulation, and that he took it for granted that because the foreclosure proceedings of the 18th September, 1882, had been recorded, therefore foreclosure necessarily took place and gave birth to the plaintiff's right of pre-emption in respect of the alienations. He assumes that the sale became absolute by the mere expiry of the year of grace.

Not only is this assumption unwarranted by the circumstances of the case, but the fact that notwithstanding the expiry of the year of grace the mortgagee, Sheodin, neither acquired possession nor sued for foreclosure till the 20th August, 1885, points to quite the opposite conclusion. It was on that day that he instituted his regular suits for possession against the vendors, and it was in that litigation that the compromise of the 19th September, 1885, was entered into declaring 8 pies of mauza Simra and 4 pies of Mahadewa to have passed to the mortgagee in full proprietorship, to the exclusion of the remaining 4 pies of Mahadewa which was released by the mortgagee and reserved by the mortgagors.

It has, indeed, been asserted in this litigation that these proceedings were all fraudulent and collusive with the object of defeating the plaintiffs' right of pre-emption. But no circumstances have been proved which would in law even amount to the *indicia* of fraud or collusion. The plaintiffs' right of pre-emption, if their theory of foreclosure proceedings of 1880 were correct, would have been asserted before, at least, the suit of the 20th August, 1885; but, far from such being the case, it is not shown that any such assertion of pre-emption was made till after the compromise of 19th

September, 1885. Indeed, even after that compromise, the plaintiffs waited more than a year before claiming pre-emption.

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I am, therefore, of opinion that till the compromise of 19th September, 1885, no foreclosure of the *bai-bil-wafa* mortgages is shown to have taken place, that the compromise is not shown to be other than a *bond fide* transaction, that the plaintiff's right of pre-emption must be referred to that date, that since by that compromise, foreclosure took place only in respect of 8 pies of Simra and 4 pies of Mahadewa to the exclusion of the remaining 4 pies of the latter village, no right of pre-emption accrued to the plaintiffs in respect of such reserved 4 pies share of Mahadewa. And it follows that the Lower Appellate Court acted erroneously in interfering with the first Court's decree in this respect, also that the two rulings, *Bhadu Mahomed v. Radha Charan Bolia* (1), *Sheodin v. Sookit* (2), on which the Lower Appellate Court has relied have no application to the facts of this case. In those cases the sales were absolute, the right of pre-emption had been asserted, and the question was whether subsequent dissolution of the sale could affect the pre-emptor's right. The result of these views will be that I shall decree the three appeals of the vendors-appellants, namely, appeals Nos. 1342, 1343, 1344.

These findings simplify the disposal of the grounds urged in the six appeals of Ajaib Nath, Kunjbehari and Brijmohan, who throughout this litigation have shown themselves unwilling to take a reasonable view of their right of pre-emption. They have been endeavouring not only to prevent their rival pre-emptor Mathura from having his share of the pre-emptive right, but also to oust the original proprietors from the 4 pies share in Mahadewa, which even the mortgagee Sheodin saved from foreclosure by the compromise of 19th September, 1885.

The first ground urged in support of their appeals is that inasmuch as their rival pre-emptor Mathura (who is respondent in all the six appeals) was content with the first Court's decree and did not appeal in respect of the 4 pies share of Mahadewa, therefore the (1) 4 B. L. R., A. C., p. 219. (2) S. D. A., N.-W. P. Rep., 1884, Vol. I, p. 624.

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entire 4 pies share should have been allotted to them in virtue of their right of pre-emption. After what I have said in respect of the appeals by the vendors in whose favour that 4 pies share was reserved, it is wholly unnecessary for me to discuss the matter any further, beyond saying that since I have held that share to have been rightly excluded by the first Court from these pre-emptive claims, neither Ajaib and others nor Mathura can take any portion of that reserved share. For the same reasons it is unnecessary to discuss the question raised in the second ground common to all these six appeals, where it is contended that Mathura respondent having taken no exception to the amount of the sale consideration adjudicated upon by the first Court, is not entitled to the benefit of any reduction therein upon the appellants' case.

The third ground of appeal, which is also common to all the six appeals, is that the respondent Mathura "having acquiesced in the transfer of the shares sued for cannot pre-empt in respect of the same." This ground of appeal was, indeed, abandoned by Mr. *Ram Prasad*, but I will dispose of it by simply saying that the plea of acquiescence is based entirely upon the circumstance that Mathura was a witness to two out of the three *bai-bil-wafa* mortgages of the 15th June, 1878, and that the Lower Appellate Court was right in holding that acquiescence in a mortgage by conditional sale does not either imply or involve the foregoing of the right to pre-empt, should the conditional sale *eventually* become absolute.

There remains only one more ground of appeal, which is limited to the three appeals (Nos. 1286, 1287, 1289) to which the vendee Sheodin is respondent, and it is against him that the plea aims. In that ground of appeal it is urged that the appellants were entitled to pre-empt the property "on payment of the amount due up to the date when the year of grace expired and could not be charged with any sum accruing since that date." This plea proceeds of course entirely upon the assumption (which I have already refuted), namely, that the *bai-bil-wafa* mortgages became absolute by reason of the foreclosure proceedings of 1880 and 1882, and by making the conditional sale absolute gave birth to the plaintiffs'

right of pre-emption. The plea also assumes that the compromise of the 19th September, 1885, is of no consequence as determining either the point of time when pre-emption accrued or the amount of price which must be taken to be the consideration in lieu of which the conditional sales became absolute. But I have already said enough to show that there is nothing to vitiate the compromise, and both the Courts below have concurred in finding that the allegations of fraud as to the amount of consideration were not substantiated. Mr. *Ram Prasad* has relied upon my ruling in *Tawakkul Rai v. Lachman Rai* (1) where I held that a person claiming a right of pre-emption in cases of mortgage by conditional sale was bound to pay the entire amount due on such mortgages at the time when they became absolute, and that they became absolute at the expiration of the year of grace required by Regulation XVII of 1806. The ruling does not help the appellant's case, because there the due foreclosure of the mortgage according to the requirements of the Regulation was an admitted fact, and therefore naturally the period of the expiry of the year of grace and the amount due on the mortgage regulated both the foreclosure and the accrual of pre-emption, and indeed would also have regulated the amount of price payable by the pre-emptor, had it not been that the pre-emptors sued not upon the ground of that foreclosure but upon the ground of a subsequent transfer (*vide* p. 350 of the report). So far as the question of the amount of consideration is concerned, perhaps the case most similar to the present is that of *Jagat Singh v. Ram Bakhsh* (2) where pre-emption was claimed in respect of a mortgage by conditional sale, foreclosure proceedings had been taken, a suit for possession had been instituted by the mortgagee and had ended in a compromise whereby half the property was released by the mortgagee, and the other half was foreclosed, for a price mentioned in the compromise, and the pre-emptive suit related to such latter half. In that case I held, as I have held here, that the price payable by the pre-emptor was the amount mentioned in the compromise.

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(1) I. L. R., 6 All., 344.

(2) Weekly Notes, 1887, p. 233.

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For these reasons all the six appeals of Ajaib and others must stand dismissed. In every one of them Mathura, the rival pre-emptor, has filed the objections under s. 561 of the Civil Procedure Code, claiming a preferential right of pre-emption. The objections were expressly abandoned by his learned counsel Mr. Dillon, and I need only say that even if they had been pressed they could not have succeeded, because they raise a question of fact which has been decided against him by the Courts below, the lower appellate Court having clearly found that there was no evidence in support of the pretention of a right of pre-emption superior to that of Ajaib and others. The objections will therefore be dismissed.

This second appeal (No. 1288) is dismissed with costs, and also the objections which Mathura respondent has filed under s. 561 of the Code of Civil Procedure.

*Appeals dismissed.*

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February 14.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Brodhurst.*

HUSAINI BEGAM (PLAINTIFF), v. THE COLLECTOR OF MUZAFFAR-NAGAR AND OTHERS (DEFENDANTS).

*Practice—Appeal—Difference of opinion on Division Bench regarding preliminary objection as to limitation—Act XV of 1877 (Limitation Act), s. 5—Letters Patent, N.-W. P., s. 27—Civil Procedure Code, ss. 575, 647—Review of judgment—Civil Procedure Code, s. 623—Court-fees—Act VII of 1870 (Court-fees Act), sch. i., No. 5—Fee payable on application to review appellate decree under Letters Patent, s. 10.*

S. 27 of the Letters Patent for the High Court of the N.-W. Provinces has been superseded in those cases only to which s. 575 of the Civil Procedure Code properly and without straining language applies. There are many cases to which s. 575, even with the aid of s. 647, does not apply; and to these s. 27 of the Letters Patent is still applicable.

One of the cases to which s. 575 of the Code does not apply is where a preliminary objection being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1877) for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a "hearing" of the appeal, but precedes the hearing, or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot

he said that the Court which, by reason of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless "affirm" the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the senior Judge should, under s. 27 of the Letters Patent, prevail.

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Where, in such a case, the provisions of the second paragraph of s. 575 of the Code were erroneously applied, and the judgment of the junior Judge holding that the appeal should be dismissed as time-barred, prevailed, and the Court, on appeal under s. 10 of the Letters Patent, affirmed such judgment,—*held* that, under the circumstances, there was a mistake or error apparent on the face of the record, and that there was sufficient cause for granting review of the Court's decree, under s. 623 of the Code.

For the purpose of ascertaining the Court-fee to be paid under sch. i, art. 5 of the Court-fees Act (VII of 1870) upon an application to review an appellate decree, the fee to be considered is the fee leviable on the memorandum of the appeal in which the decree sought to be reviewed was passed, and not the fee which was leviable on the plaint nor—where the decree sought to be reviewed was passed on appeal under s. 10 of the Letters Patent from an appellate judgment of a Division Bench—the fee which was leviable on the memorandum of the appeal before such Bench.

THIS was an application under s. 623 of the Civil Procedure Code for review of a judgment of Edge, C.J., and Straight and Brodhurst, JJ., which will be found reported in I. L. R., 9 All., 655. That judgment was delivered on an appeal under s. 10 of the Letters Patent from a judgment of Mahmood, J., in which his Lordship differed in opinion from Tyrrell, J., Mahmood, J., holding that the appeal before the Division Bench should be dismissed as barred by limitation, and Tyrrell, J., that "sufficient cause" for an extension of time had been shown by the appellant within the meaning of s. 5 of the Limitation Act (XV of 1877), and that the appeal should be heard and determined on the merits. The judgments of Tyrrell and Mahmood, JJ., in which the facts of the case were stated, will be found reported in I. L. R., 9 All., 11.

The Division Bench hearing the appeal thus differing in opinion, the appeal was, with reference to the second paragraph of s. 575 of

(1) I. L. R., 3 Bom., 204.

(2) I. L. R., 10 Calc., 814.

1889      the Civil Procedure Code, dismissed; and the appeal under s. 10 of  
 HUSAINI      the Letters Patent was argued and decided upon the assumption  
 BEGAM      that s. 575 was applicable to the case, and that, in accordance with  
 v.      it, the judgment of Mahmood, J., maintaining that of the Court  
 THE COLLEC-      below, determined the appeal before the Division Bench. In the  
 TOR OF      result, the appeal under s. 10 of the Letters Patent was dismissed,  
 MUZAFFAR-      the Court agreeing with Mahmood, J.  
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The present application was for review of this judgment upon grounds which are fully explained in the judgment of Edge, C.J., now reported.

Pandit *Sundar Lal* (at the request of the Court) argued the case for the petitioner.

Mr. *G. E. A. Ross*, and Pandit *Bishambhar Nath*, for the respondents.

EDGE, C.J.—This application for a review of judgment arises in this way. The first appeal in the suit was admitted to the file of first appeals by my brother Tyrrell. When the first appeal came on to be heard by my brother Tyrrell and my brother Mahmood, a preliminary objection on behalf of the respondents to the appeal being heard, that the appeal was time-barred, was taken. My brother Tyrrell was of opinion that the appellant had shown sufficient cause for not presenting the appeal within the prescribed time. My brother Mahmood was of the contrary opinion; and applying the provisions of s. 575 of the Code of Civil Procedure and s. 4 of the Indian Limitation Act, 1877, to the case, the appeal was dismissed with costs as being time-barred. By the decree which was drawn up, the appeal was dismissed with costs, and the decree from which that appeal had been brought was affirmed.

From that decree, or rather from the judgment or order of my brother Mahmood, an appeal was brought by the appellant under s. 10 of the Letters Patent which apply to this Court. The last-mentioned appeal, which was a pauper appeal, was heard by my brother Straight, my brother Brodhurst, and me, and we agreeing with the judgment of my brother Mahmood that the appellant had not shown sufficient cause for not presenting the first appeal within

time, dismissed the appeal to us. This application to us is to review our decree.

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Pandit *Sundar Lal* kindly undertook at our request to assist the Court by arguing the case for the applicant. Pandit *Bishambhar Nath* for some of the respondents took the preliminary objection that the application for review was insufficiently stamped, in that it was not stamped with one-half the fee which was leviable on the first appeal. We overruled that objection, holding that as the application for review had been presented before the ninetieth day from the date of the decree which we were asked to review, art. 5 of sch. i of the Court-fees Act applied, and that for the purpose of ascertaining the court-fee to be paid on an application to review a decree passed in appeal, the fee which must be considered was the fee leviable on the memorandum of the appeal in which the decree sought to be reviewed was passed, and not the fee which was leviable on the plaint, or, as in this case, on the first appeal.

Pandit *Sundar Lal* contended that the appeal which we had decided must have prevailed if we had not omitted to consider the provisions of s. 27 of the Letters Patent, and that the question which we ought to have decided was not that which we did decide, namely, that the appellant had not shown sufficient cause for not presenting the first appeal within the prescribed time, but the question whether or not my brother Tyrrell and my brother Mahmood should not have proceeded to hear the first appeal on the merits, as my brother Tyrrell, who was the senior Judge, had decided that the appellant had shown sufficient cause for not presenting the first appeal within time. He contended that s. 575 of the Code of Civil Procedure did not apply to a case like the present, and consequently that s. 27 of our Letters Patent governed the procedure. On the other hand, Mr. *Ross* for some of the respondents and Pandit *Bishambhar Nath* for the others, contended that s. 575 of the Code of Civil Procedure had superseded s. 27 of the Letters Patent so far as our appellate jurisdiction is concerned. They relied on *Appaji Bhivray v. Shivalal Khubchand* (1) and

(1) I. L. R., 3 Bom., 204.



1689 *Gossami Sri 180 Sri Gridhariji Maharaj Tickait v. Purushotum Gossami* (1) and s. 647 of the Code of Civil Procedure.

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In the Bombay case, the Court held that the corresponding section of their Letters Patent was superseded by s. 575 of Act X of 1877, so far as regards cases to which s. 575 was applicable, and that s. 575 was extended to miscellaneous proceedings of the nature of appeals by s. 647, with which decision I entirely agree. In the Calcutta case, the Court agreed with the view taken by the Bombay High Court in *Appaji Bhierav v. Shirlall Khubchand* (2). I may remark that in each of these cases, s. 575 of the Code of Civil Procedure was applicable.

The material words in s. 27 of our Letters Patent are, "and if such Division Bench is composed of two or more Judges, and the Judges are divided in opinion as to the decision to be given on any point, such point shall be decided according to the opinion of the majority of the Judges if there shall be a majority; but if the Judges should be equally divided, then the opinion of the senior Judge shall prevail."

If s. 27 of our Letters Patent applied, my brother Tyrrell and my brother Mahmood should have proceeded to hear the appeal and should not have dismissed the appeal on the ground that it was beyond time.

The real question for us to decide is whether s. 575 of the Code of Civil Procedure applies to this case.

According to the well established practice of this Court, it is open to a respondent, when an appeal is called on for hearing, to take the preliminary objection to the appeal being heard, that the appeal was time-barred when the memorandum of appeal was presented to the Court for admission on the file, and such preliminary objection is decided upon before the hearing of the appeal is proceeded with. In such cases there is in fact no hearing of the appeal unless and until the Court has overruled such preliminary

(1) I. L. R. 10 Calc., 814. (2) I. L. R. 3 Bom., 204.

objection. When such preliminary objection is taken, the question is whether there is before the Court an appeal which can, having exclusive regard to the provisions of the Indian Limitation Act, be heard. When the preliminary objection is sustained, it cannot be said that the appeal has been heard or decided. In such a case, all that can be decided is that there is no appeal before the Court which the Court can hear or decide.

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An examination of s. 575, in my opinion, shows that that section cannot apply to a case like the present. The second paragraph of that section provides that "if there be no such majority which concurs in a judgment varying or reversing the decree appealed against, such decree shall be affirmed." In such a case as the present, unless s. 27 of our Letters Patent applies, there could be no judgment at all varying, reversing or affirming the decree. It could not possibly have been the intention of the Legislature that a Court should decree that a decree against which there was by reason of the Indian Limitation Act no appeal for the Court to hear, should be affirmed; in other words, that a Court which, by reason of the Indian Limitation Act, had no jurisdiction to hear the appeal, should nevertheless affirm the decree below.

It was contended on behalf of the respondents that in such a case it would be the duty of the Judges differing to act in accordance with the provisions of the third paragraph of s. 575. I do not see that any such duty is imposed on Judges differing, and if there is any such duty, that paragraph applies only to cases in which "the Bench differ in opinion on a point of law," in which case only can the Bench, differing in opinion, make such a reference.

Assume, for the purposes of argument, that in the present case my brother Tyrrell and my brother Mahmood were agreed that the cause alleged by the appellant was, if proved, sufficient cause for the appellant not presenting the appeal within the prescribed time, but that whilst my brother Tyrrell was of opinion that the cause alleged was proved in fact, my brother Mahmood was of opinion that it was not in fact proved. In that event, no such reference,

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as is provided for by the third paragraph of s. 575 could be made, as the Bench had not differed on a point of law.

There are many cases to which, in my opinion, s. 575 could not apply, even with the aid of s. 647. For example, suppose that an application is made to this Court under the first paragraph of s. 545 of the Code of Civil Procedure, and the two Judges, constituting the Bench before which the application is heard, differ in opinion as to whether "substantial loss may result to the party applying for stay of execution unless the order is made." What is to happen unless s. 27 of our Letters Patent applies? If s. 27 does not apply, the application could neither be rejected nor granted; there would be no decree or order to affirm; and there would be no power to refer the question under the third paragraph of s. 575; in fact, the Court, in the exercise of its jurisdiction under s. 545 of the Code of Civil Procedure, would be brought to a dead-lock.

Similar difficulties might arise on an application for a certificate to appeal to Her Majesty in Council and in many other cases.

I am of opinion that s. 27 of our Letters Patent is superseded in those cases only to which s. 575 of the Code of Civil Procedure properly, and without straining language, applies, and that this is not one of those cases. I am consequently of opinion that, on the preliminary objection to the hearing of the first appeal which was taken before my brother Tyrrell and my brother Mahmood, the opinion of my brother Tyrrell should have prevailed, and the hearing of the appeal should have proceeded on the merits according to law. I am also of opinion that, under the circumstances, there is a mistake or error apparent on the face of the record, and that there is sufficient reason for our granting this application for review of our decree and that we should grant this application.

As the counsel and vakils in the case do not desire to be further heard on the re-hearing of the appeal to which this order of mine applies, we now proceed to dispose of the appeal.

For the reasons already stated, I am of opinion that the decree appealed against should be set aside, and that the first appeal in this case should be reinstated on the file of pending appeals, and should be heard and decided according to law, and that the costs of this application and of the appeal to us should abide the result of the determination of the first appeal.

STRAIGHT, J.—I agree.

BRODHURST, J.—I concur.

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## APPELLATE CRIMINAL.

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October 24.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

QUEEN-EMPRESS v. LAL SAHAI.

*Evidence—Witnesses—Competency of person of tender years—Act I of 1872 (Evidence Act), s. 118—Judicial oath or affirmation—Act X of 1873 (Oaths Act), ss. 6, 13—Omission to take evidence on oath or affirmation.*

The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the evidence Act, has not to enter into inquiries as to the witness's religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established.

Having regard to the language of the Oaths Act (X of 1873) a Court has no option, when once it has elected to take the statements of a person as evidence, but to administer to such person either an oath or affirmation as the case may require. *Queen-Empress v. Maru* (1) referred to.

In a trial for murder before the Court of Session, one of the witnesses was a boy of twelve years of age, and in answer to questions put by the Sessions Judge, he said that he worshipped Debi and understood the difference between truth and falsehood, that he did not know what would be the consequences here or hereafter of telling lies but that he would tell the truth. The Sessions Judge proceeded to record the boy's statement, but without administering to him any oath or affirmation.

(1) I. L. R., 10 All., 207.

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*Held* that there was nothing in the law to sanction this procedure on the part of the Judge.

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The High Court required the attendance of the boy and of the accused, and having satisfied itself of the competency of the former to depose as a witness, examined him as to his account of what had occurred.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

The appellant was not represented.

The *Public Prosecutor* (Mr. G. E. A. Ross) for the Crown.

STRAIGHT, J.—This is an appeal from a capital conviction of the Sessions Judge of Cawnpore, and the case also comes before us for confirmation of the sentence of death passed upon the appellant under the provisions of the statute. The appellant was charged with having, upon the 25th July 1888, at a village called Garahya in the Cawnpore district, murdered Musammatt Mathuria, his wife. The committing Magistrate in sending the case for trial, among the other witnesses whose depositions had been taken, recorded the deposition of a boy of the name of Churia, the son of the appellant, and his evidence, if true, was of the most vital importance to the case for the prosecution, establishing as it did the presence of the appellant upon the scene of the murder immediately after it had been committed, and the use of an expression by the appellant towards the boy which was consistent only with the notion that the person who made use of it was the perpetrator of the crime. When the case came before the learned Sessions Judge, the boy Churia was called, and it was recorded by the Sessions Judge with regard to him that he was the son of Lal Sahai, that his age was twelve, and then the learned Judge's record goes on to say that, without administering any oath, he asked him some questions, to which he answered as follows:—"I worship Debi. I understand the difference between truth and falsehood. I don't know the consequences here or hereafter of telling lies, but I will tell the truth," and then the learned Judge records, "No oath is administered to this child." Despite this circumstance therefore, and though the learned Judge intentionally omitted either to swear or affirm the child, he proceeded to take from him a lengthened statement as a witness. In my

opinion there is nothing in the law to sanction this procedure on the part of the learned Sessions Judge. Either a person is or is not made a witness: if he is made a witness, then the law of this country requires that he should be either sworn or affirmed. The competency of such person to be a witness is a matter for the Court to decide as a condition precedent to his being either sworn or affirmed; the credibility to be attached to his statements is another matter altogether, and that question only arises when he has been sworn or affirmed and has given his evidence as a witness. As to the competency of witnesses, that is specifically and in terms declared by s. 118 of the Evidence Act, and I find in that section no direction or intimation to a Court which has to deal with the question whether a person should or should not be examined, that it is to enter upon inquiries as to his religious belief or open up such a field of speculation as is involved in the query, "What will be the consequences here or hereafter if you will not tell the truth?" What I take the law to say is, and a very sound and sensible law I hold it to be, that a Court is to ascertain in the best way it can whether, from the amount of intellectual capacity and understanding of a young or old person, that person is able to give a rational and intelligent account of what he has seen, or heard, or done on a particular occasion, and if the Court is satisfied that a child of twelve years or an old man or woman of very advanced age can satisfy those requirements, the competency of the witness is established. I am very clearly of opinion that having regard to the language of the Oaths Act, neither a Judge nor a Magistrate has any option, when once he has elected to take the statements of a person as evidence, but to administer either the oath or affirmation to such person as the case may require, and I think it well that this should be understood by such tribunals in these Provinces, in order that they in future may guard against a repetition of the delay and inconvenience that has been caused by the learned Judge's defect of procedure in the present case. I need only further remark in this connection that it might happen that a very grave miscarriage of justice should occur in consequence of the omission of which I have spoken. In a former case involving the same question, I made reference to a learned

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1888.      ruling of my brother Mahmood in *Queen Empress v. Maru* (1), and  

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QUEEN-      my brother Tyrrell and myself having that ruling present to our  
EMPRESS      minds, thought it desirable and proper in a case of the gravity of the  
v.      present case to see that what had been omitted to be done by the  
LAL SAHAI.      learned Judge in regard to the lad Churia was supplied in this Court.  
Consequently, we gave directions for the convict Lal Sahai to be  
brought before us, and directed the attendance of the boy Churia in  
order that the latter might, after we had satisfied ourselves of his  
competency to depose, be put either on oath or affirmation and  
examined as to his account of the proceedings that took place upon  
the night on which his mother was most undoubtedly murdered. I  
was most thoroughly satisfied by his answers to the preliminary  
questions that were put to the lad by my brother Tyrrell that he was  
a perfectly intelligent creature; that he was quite capable of giving  
thoroughly rational answers which, by the way, his reply to my  
examination of him through the interpreter abundantly showed:  
and further, when he gave his evidence, that he told a true and  
untutored story of what actually transpired upon the night of  
his mother's death. It was strikingly noticeable that instead of  
trying to avoid giving direct answers to my questions as an  
Indian witness would who had had a tale taught him to tell, he care-  
fully waited to hear what my questions were, and when he did not  
understand them asked to have them explained to him. I may add  
that I took special pains in conducting his examination, to avoid, as  
far as possible, putting the questions to him in a shape that would  
in any way suggest his answers or refresh his memory as to what  
he had said on former occasions. I have heard and considered the  
whole of his evidence with very great attention and anxiety, and I  
am convinced that the little lad is telling the absolute and entire  
truth, and that when he spoke as to the appellant being the person  
who was "flying" from the shed immediately after the murder,  
and said that he screamed out and the appellant used the expression  
he described, he stated the truth. His evidence is corroborated by  
the evidence of his two uncles Manohar and Himatia, and I do not  
for one moment believe that these two men have deliberately united

(1) I. L. R., 10 All., 207.

in a conspiracy, not only between themselves but with the police, for the purpose of procuring the conviction and execution of an innocent man for their sister's murder. Whatever may have been the motive which led the unfortunate deceased to go from her old house at Lalgaoon to her brother's house to Garahya, I cannot pretend to say, for I have no reliable information before me upon the subject. But that the appellant followed her, and that he was constantly endeavouring to get her to go back to Lalgaoon, is a matter about which I entertain no doubt, or that on her refusal to do so he resolved to put her out of the way and did so. The murder was a very cruel and cowardly one, perpetrated upon a sleeping and defenceless woman, and there are no circumstances of extenuation whatever which would justify me in mitigating the extreme penalty which the learned Judge, with whom the assessors agreed in convicting, passed upon the appellant. The appeal is dismissed, the sentence confirmed, and I direct that it be carried into execution, and I further direct that the appellant be taken back to the jail from which he came for the purpose of the sentence being carried out.

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TYRRELL, J.—I concur.

*Appeal dismissed and sentence confirmed.*

### FULL BENCH.

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Novem-  
ber 15.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell, and Mr. Justice Mahmood.*

SUKH LAL (DEFENDANT) v. BHIKHI (PLAINTIFF).\*

*Civil Procedure Code, ss. 13, 373—Dismissal of suit—Decree containing clause stating that a fresh suit might be instituted as to a part of the subject-matter—Res judicata.*

A suit for possession of immovable property was wholly dismissed on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—"This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammat Lachminia in the fields specified in the deed of sale," upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another



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suit upon the same title to recover possession of the one-third share referred to in the order just quoted.

*Held* by the Full Bench that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect; that, as in the former suit the plaintiff could have obtained a decree for the one-third share now claimed, and the whole of the claim in that suit was dismissed, the decree in that suit was a decision within s. 13 of the Civil Procedure Code, and the present suit was consequently barred as *res judicata*. *Kudrat v. Dinu* (1), *Ganesh Rai v. Kalka Prasad* (2), *Salig Ram Pathak v. Tirbhawan Pathak* (3), and *Muhammad Salim v. Nabian Bibi* (4) explained.

THIS was a reference to the Full Bench of an appeal which originally came for hearing before Mahmood, J. The facts are sufficiently stated in the judgment of Edge, C.J.

Mr. Niblett, for the appellant.

Mr. Simeon, for the respondent.

EDGE, C.J.—The plaintiff in this case brought an action to recover certain plots of land. He was met by the defence of *res judicata*. That defence arose in this way. The present plaintiff had previously brought an action against these defendants for 6 bighas odd of land, the title alleged by him being a sale-deed from one Musammat Lachminia. In that action the Munsif had held that the plaintiff had not made out his title to the whole of the land claimed, although he had proved title to a one-third share of the land then in suit. He dismissed the action, but included in his decree an order in these terms:—

“This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammat Lachminia in the field specified in the deed of sale, dated 18th February 1884.”

That decree was not appealed from; and subsequently the present action was brought for that one-third interest of Musammat Lachminia which was referred to in the decree of the Munsif in the previous case. The Subordinate Judge on appeal in this case held

(1) I. L. R., 9 ALL., 155.

(2) I. L. R., 5 ALL., 595.

(3) Weekly Notes, 1895, p. 171.

(4) I. L. R., 8 ALL., 282.

that s. 18 of the Code of Civil Procedure did not apply. From his decree the defendants appealed. It is not contended on behalf of the respondent here, the plaintiff, that this order was one made under s. 373 of the Code of Civil Procedure. Indeed, it could not be contended that s. 373 could apply, inasmuch as no application was made in the prior suit by the plaintiff for liberty to withdraw from or abandon any portion of his claim. Further, the decree in the prior suit was one of dismissal and not in the nature of an order allowing the plaintiff to withdraw or abandon his claim with leave to bring a fresh action.

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It appears to me that the Munsif probably thought that he could pass a decree which would operate as a non-suit did formerly in an English Court. It has been decided by the Privy Council, and we, of course, followed that decision in the case of *Banwari Das v. Muhammad Mashiat* (1), that there is no power in any Court in India to pass a decree in the nature of a non-suit.

It has been contended on behalf of the respondent that I have already decided that where a reservation, such as there is here, appears in a decree, that reservation enables the then unsuccessful party to maintain a fresh suit. That contention is based on the following passage in my judgment in *Kudrat v. Dinu* (2):—"The Munsif in dismissing the suit did not reserve to the respondents the right to bring a fresh action." It is contended that that passage means that if the Munsif, while dismissing the suit, had reserved to the respondents the right to bring a fresh suit, respondents would have been entitled to maintain such an action. The passage to which I have referred was an answer to one of the arguments put before us in that case, namely, that the judgment or decree in that case did include such a reservation: and the passage above quoted was merely intended as a negation of that suggestion, and not as throwing out any suggestion that if such a reservation had been made, it would have had any effect in law. The Munsif here had, in the first case, no power to make any such reservation or order as appears in his decree. His including that order in his decree was

(1) I. L. R., 9 All., 690.

(2) I. L. R., 9 All., 155.

1888      in excess of any powers which any Judge in India has; and that  
 SUKH LAL      portion of the decree, although not appealed against, might be treated,  
                  v.      in my opinion, as an absolute nullity. The Munsif could not by  
 BRIKHI.      the insertion of such words in his decree create in India a decree of  
                  non-suit which is not provided for by law, and which the Privy  
                  Council has expressly ruled does not exist in India.

Consequently, I am of opinion that the fact that that decree was not appealed against does not give that order contained in it any effect.

The only other point raised on behalf of the respondent is whether this was a case falling with s. 13. In the former case, as I have said, the plaintiff sued for 6 bighas odd of land on the same title as that upon which he comes into Court to-day. In that former suit he could have obtained, if the Munsif had decided rightly in law, a decree for the one-third interest to which he had established his right; so that in fact the relief regarding the one-third interest was a relief which he could have obtained in the former suit, exactly upon the same title upon which he has brought his present suit. Because the Munsif wrongly dismissed his whole claim instead of granting him relief in respect of the one-third interest to which he was entitled, it does not render the decision in the former case any the less a decision coming within s. 13 of the Civil Procedure Code.

I am of opinion, therefore, that this appeal should be allowed with costs, and the judgment and the decree of the Court below being reversed, the suit should stand dismissed with costs in all Courts.

TYRRELL, J.—I understand that the reason for this reference is to be found in the last paragraph of my brother Mahmood's order of the 30th July 1888, where he says :—"The earliest ruling is *Ganesh Rai v. Kalka Prasad* (1), which was dissented from by Oldfield, J., in *Salig Ram Pathak v. Tirbhawan Pathak* (2), and I concurred in his judgment. For the second time that ruling was

(1) I. L. R., 5 All., 595.

(2) Weekly Notes, 1885, p. 171.

dissented from by me in *Muhammad Salim v. Nabian Bibi* (1) and Oldfield, J., concurred with me. The last case is *Kudrat v. Dinu* (2) in which the learned Chief Justice made no reference in his judgment to the earlier rulings, but my brother Tyrrell in explaining his ruling in *Ganesh Rai v. Kalka Prasad* (3) seemed to think that Oldfield, J., and myself had misunderstood its effect when we dissented from it."

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I endeavoured in my judgment in *Kudrat v. Dinu* (2) to explain how the case of *Ganesh Rai v. Kalka Prasad* (3) differed essentially and also in its particulars from the case of *Salig Ram Pathak v. Tirbhawan Pathak* (4) and of *Muhammad Salim v. Nabian Bibi* (1). I pointed out that in respect of *Ganesh Rai v. Kalka Prasad* (3) the Court in the previous action which was pleaded in bar under s. 13, Civil Procedure Code, had heard the parties, had framed its issues, had taken evidence and proceeded to decree under chapter 17 of the Civil Procedure Code. I said :—" I fully concur, and would only add that this suit is exactly similar to *Ganesh Rai v. Kalka Prasad* (3). The ruling in that case has been questioned subsequently by Mr. Justice Mahmood—*Muhammad Salim v. Nabian Bibi* (1)—who dissented from the law as laid down therein. But the learned Judge did not discern that the case of *Ganesh Rai v. Kalka Prasad* (3) was essentially distinguished from the three cases he had to determine. In *Ganesh Rai v. Kalka Prasad* (3) the Court had heard the parties, framed issues after taking evidence, and proceeded to judgment. In the cases before Mahmood, J., the plaintiff was non-suited on the preliminary ground of misjoinder."

I may add now that the judgment in *Ganesh Rai v. Kalka Prasad* (3) was against the plaintiff on this ground. The Munsif found that his title was contained in a sale-certificate. The Munsif thought that this being so, the plaintiff was disqualified from proving his title *aliunde* : and holding that the sale-certificate was one of those documents which could not be received in evidence after the filing of the plaint, he dismissed the plaintiff's suit for want of evidence and decreed accordingly under chapter 17 of the Civil

(1) I. L. R., 8 All., 282.

(2) I. L. R., 9 All., 155.

(3) I. L. R., 5 All., 595.

(4) Weekly Notes, 1885, p. 171.

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Procedure Code. Now in the case of *Salig Ram Pathak v. Tirbhawan Pathak* (1) my brother Oldfield in his judgment stated that the previous "suit was dismissed on a preliminary and technical point, and there was no hearing or decision of the matter in issue in that suit, nor indeed was there any intention on the part of the Court to hear and decide it; the Court, in fact, refused to do so." The report states that the defect was misjoinder for want of all the proper parties.

Again in *Muhammad Salim v. Nabian Bibi* (2), my brother Mahmood wrote in his judgment that the previous "suit was dismissed on the ground of misjoinder, and also because the suit was undervalued, and the plaintiff had failed to pay, within the time fixed, additional court-fees required by the Court." The learned Judge further found that the suit had, in fact, been dismissed under s. 10 of the Court-Fees Act. The case was disposed of in the manner contemplated by the fourth Chapter of the Civil Procedure Code. However, it appears that at the hearing of both those cases the ruling contained in *Ganesh Rai v. Kalka Prasad* (3) was cited and relied upon, as if it was on all fours with the two other cases. In the former of the two, *i.e.*, in *Salig Ram Pathak v. Tirbhawan Pathak* (1) my brother Oldfield said: "I am unable to concur in the opinion expressed by the learned Judges in the case cited by the Judge, and the view I have taken is supported by numerous decisions." In the other case, that is to say, in the case of *Muhammad Salim v. Nabian Bibi* (2) my brother Mahmood at the conclusion of his judgment said: "*Res judicata dicitur quae finem controversiarum pronuntiatione judicis accepit quod vel condemnatione vel absoluteione contingit* (Dig. XLII, Tit. I. Sec. I). The case of *Ganesh Rai v. Kalka Prasad* already referred to ignores this fundamental principle of law; and this is not the first occasion upon which my learned brother Oldfield and myself have expressed our dissent from that ruling, and we did so before in a case—*Salig Ram v. Tirbhawan Pathak* (1), in which the point of determination was very similar to this case."

(1) Weekly Notes, 1885, p. 171.

(2) I. L. R., 8 All., 282.

(3) I. L. R., 5 All., 695.

As I have pointed out above, it has hitherto seemed to me and it still seems to me that there is no similarity between those cases. But it is possible that the learned Judges in question were misled by the reporting of the facts of the case of *Ganesh Rai v. Kalka Prasad*(1). The report represents in that case that the Munsif "dismissed it on the 23rd May, 1881, in the form in which it was brought (*ba haisiyat maujud*), on the ground that the plaintiff had not filed his certificate of sale with the plaint." This is an insufficient, if not an incorrect description of the case of *Ganesh Rai v. Kalka Prasad* (1). I have now endeavoured again to explain why I have thought this last mentioned case was not on all fours with the cases before my brother Mahmood, but essentially distinguishable from them. I have only now to say that I entirely concur with the judgment and the order of the learned Chief Justice.

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MAHMOOD, J.—The facts of this case are fully stated in my order of reference of the 30th July, 1888, which I passed after obtaining the learned Chief Justice's permission to refer this case, which I may call a very simple case, to a Bench of more than two Judges. It was by an order of the learned Chief Justice that the case was laid before this Bench. I confess frankly that I should not have passed that order without much greater hesitation than I have had, because throughout the whole argument that was addressed to me by the learned pleaders of the parties, I regarded the question raised as a simple question which was an elementary proposition of law, after the numerous amount of case authority that existed on the point. That question has been mentioned by the learned Chief Justice, and I have only to add that I agree in the conclusions arrived at by him.

But the only justification which I could have had to take up the time of three Judges can be best explained by saying that I am glad to find that my brother Tyrrel has now pointed out that the report of the case of *Ganesh Rai v. Kalka Prasad* (1) misled not only me for the first time, but our late colleague Oldfield, J., in the case of *Salig Ram v. Tirbhawan* (2), and also misled both him and me in a second

(1) I. L. R., 5 All., 595.

(2) Weekly Notes, 1885, p. 171.

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case. Further I may be allowed to observe that similar was the difficulty which arose in the case of *Kudrat v. Dinu*, (1). If I could have understood those rulings in the sense in which my learned brother has now explained them, I should not have considered it necessary to entertain an apprehension that there was any conflict of opinion in this Court upon the question of law dwelt upon and decided by me in *Muhammad Salim v. Nabian Bibi* (2). To those views I still adhere, and if the smallest disagreement existed upon the Bench in this case, I should have considered it my duty to show more clearly that where an issue has been raised and evidence received and adjudication arrived at, the suit does become a *res judicata*, and *Muhammad Salim v. Nabian Bibi* (2) is not opposed to that view. It would be simple expenditure of time to consider the matter further, because I concur in the learned Chief Justice's judgment in the case of *Kudrat v. Dinu* (1), and I concur in the view which he has expressed in this case.

I may, however, add for the sake of further accuracy and of the importance to be attached to head-notes, that the head-note in *Muhammad Salim v. Nabian Bibi* (2) represents me as holding that the words "*ba haisiyat maujudu*" must be taken as amounting to a permission to the plaintiff to bring another suit, within the meaning of s. 373, Civil Procedure Code. The note goes beyond what I said in any portion of my judgment in that case.

*Appeal allowed.*

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 December 7.

## FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Tyrrell and Mr Justice Mahmood.*

JANKI (PLAINTIFF) v. NAND RAM AND ANOTHER (DEFENDANTS).\*

*Hindu law—Joint Hindu family—Hindu widow—Maintenance—Suit by sister-in-law against brother-in-law—Death of plaintiff's husband prior to his father's death and therefore devolution of father's self-acquired estate—"Ancestral property"—Legal obligation of heir to fulfil moral obligations of last proprietor.*

In a Hindu family governed by the Mithakshara law, and living joint in food and worship, there was no joint or ancestral property, but the father possessed certain

(1) I. L. R., 9 All., 155. (2) I. L. R., 8 All., 282.

separate and self-acquired property. He had two sons, one of whom predeceased him, leaving a widow. He died intestate, leaving a son and a widow. The widow of the son who had predeceased his father, was, at the time of her husband's death, a minor; she had never cohabited with him or resided with his family or received from them any maintenance, but had always resided with and been maintained by her own father. After her father-in-law's death, she sued her brother-in-law and her father-in-law's widow for maintenance, which she claimed to have charged upon the immoveable property which had belonged to the father-in-law during his lifetime, and which was now in the hands of the defendants.

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*Held* (MAHMOOD, J., expressing no opinion on this point) that the property in suit, though inherited by the defendants, could not, so far as the plaintiff's rights were concerned, be correctly described as "ancestral property" in the defendant's lands, from which she would be entitled to maintenance; inasmuch as, during the father's lifetime, it was not in any sense ancestral, and the sons had no coparcenary interest in it, but merely the contingent interest of taking it on their father's death intestate, and, in the case of the plaintiff's husband, such interest, by reason of his predeceasing his father, never became vested. *Adhibai v. Cursandas Nathu* (1) dissented from on this point. *Savitribai v. Luximibai* (2) referred to.

*Held*, however, that the father was under a moral, though not a legal, obligation not only to maintain his widowed daughter-in-law during his lifetime, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by suit against that son (who took the estate not for his own benefit but for the spiritual benefit of the last proprietor) and against the property in question. *Adhibai v. Cursandas Nathu* (1), *Ganga Bai v. Sita Ram* (3) *Kalu v. Kashibai* (4), *Khetramani Dasi v. Kashinath Das* (5), *Rajjmoney Dosses v. Shikunder Mullie* (6) and *Tulsha v. Gopal Rai* (7) referred to.

*Per* MAHMOOD, J.—There is no difference between the Mitakshara and the Bengal Schools of Hindu law regarding the principle that the right of inheritance is based on the spiritual benefits which the heir, by taking the estate, renders to the soul of the deceased proprietor. There is a difference between the two schools only on a matter of detail relating to questions of preference between various competing classes of heirs.

THE facts of this case are fully stated in the judgment of the Court.

Pandit Sundar Lal, for appellant.

- (1) 1 L. R., 11 Bom., 199.
- (2) 1 L. R., 2 Bom., 573.
- (3) 1 L. R., 1 All., 170.
- (4) 1 L. R., 7 Bom., 127.

- (5) 2 B. L. R., A. C., 15.
- (6) 2 Hyde., 103.
- (7) 1 L. R., 6 All., 632.



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*Munshi Mahto Prasad*, for the respondents.

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EDGE, C.J., and TYRELL, J.—Musammat Janki, the appellant here and plaintiff in the action, is the widow of one Ghasi Ram, who, whilst yet a minor, died in the lifetime of his father Khiali Ram. The defendants-respondents here are Nand Ram, the sole surviving son of Khiali Ram, and Musammat Ruku, Khiali Ram's widow. The plaintiff sought by her action a decree for maintenance and to have that maintenance charged upon immovable property which she alleged belonged to Khiali Ram in his lifetime and to be now in the hands of the defendants. Several questions were raised by the written statement of the defendants. For the purposes of this second appeal it is only necessary to refer to two of them. It was alleged that the plaintiff had left Khiali Ram's home and had since been supported by her own father. It was also alleged that some of the property in question had been purchased by Khiali Ram and Musammat Rukku out of moneys acquired by trade, and that other portions of it had been acquired by Musammat Rukku with her own moneys. The Munsif of Amroha by his decree of the 26th November 1886, dismissed the claim with costs. On appeal the Subordinate Judge of Moradabad found that the plaintiff had been married to Ghasi Ram; that Ghasi Ram had died whilst she was yet a minor; that the *gauna* ceremony of the plaintiff had not been performed; that the plaintiff had always lived in the house of her own father; that she had never gone to the house of her father-in-law Khiali Ram or of Ghasi Ram, her late husband; that the plaintiff had always been supported by her own father; that Khiali Ram had never made her any allowance for maintenance; that the property in question was not ancestral property of Khiali Ram, but had solely belonged to him, since whose death it has been held by his surviving son, Nand Ram. The Subordinate Judge, holding that according to Hindu law the plaintiff could not get her maintenance charged upon or settled out of property in which her late husband Ghasi Ram had no right, by his decree dismissed her appeal with costs and confirmed the decree of the Munsif. From that decree of the Subordinate Judge this second appeal has been brought.

As we read the finding of the fact of the Subordinate Judge, the property in question was the self-acquired property of Khiali Ram who having made no disposition affecting it, it came on his death to the surviving son, the defedant Nand Ram.

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It has not been suggested that any property in which Khiali Ram had any interest other than that in suit came to the hand of Nand Ram.

Mr. *Madho Prasad*, who appeared before us for the respondents, did not contend that the fact that the plaintiff had always resided with and been supported by her own father and that no allowance for maintenance had been made to her by her late husband or by Khiali Ram, could under the circumstances of this case of itself disentitle her to maintain this suit.

Under these circumstances the sole question which we have to consider, is whether the plaintiff can maintain this suit, having regard to the fact that the only property which has come to the hands or into the possession of the defendant Nand Ram was property separately or self-acquired by his deceased father Kihali Ram.

Pandit *Sundar Lal* on behalf of the plaintiff contended, firstly, that as Ghasi Ram, Khiali Ram, and the defendant Nand Ram had during their joint lives been members of a joint Hindu family, they were coparceners, and that Ghasi Ram had a coparcenary right in the self-acquired property of his father, subject, however, to the liability of having that right defeated by a disposition by Khiali Ram of the property, and as no such disposition had taken place, the property in question must be regarded as ancestral property in the hands of Nand Ram ; and, secondly, that whether the property in question can be regarded as ancestral property or not, there was a moral obligation on Khiali Ram to maintain and to provide for the future maintenance of his widow daughter-in-law, the plaintiff, and that that obligation, which, so far as Khiali Ram was concerned, was merely a moral obligation, became a legal obligation on the part of his surviving son Nand Ram by reason of Nand Ram's having on the death of Khiali Ram taken the property in question by inheritance. Mr. *Madho Prasad*, on behalf of the defendants-respond-

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As we understand the term ancestral property, the property in question here might as regards the rights of Nand Ram and his sons or descendants if any *inter se* be correctly described and treated as ancestral property, but we think that so far as the plaintiff's rights if any, are concerned it would be incorrect to describe it as ancestral property in the hands of Nand Ram. It was the self and separately acquired property of Khiali Ram over which he had an absolute power of disposition and in which his sons had during his lifetime no interest other than the contingent interest of the right to take it by inheritance on his death in case he had made no disposition of it. During the lifetime of Khiali Ram and also during the lifetime of Khiali Ram the property in question was not any sense of the term as we understood it "ancestral property." Nor was it in our opinion property in which there was any coparcenary right, and we fail to see on what principle the plaintiff is entitled to have the property treated, so far as she is concerned, as ancestral property in the hands of her brother-in-law Nand Ram. In our opinion the plaintiff would necessarily fail in the suit if her right to the relief asked for depended solely on the question as to whether the property could be regarded so far as she is concerned as "ancestral property" in the hands of Nand Ram.

It may, we consider, now be treated as settled law, so far at least as these Provinces are concerned, that a Hindu widow cannot maintain a suit for maintenance against her father-in-law if he has no fund with the disposal of which his son, if alive, could interfere, and if he has inherited nothing from his son and has not had his rights in any property enlarged by his son's death, that her right

(1) I. L. R., 11 Bom., 199.

under such circumstances as against her father-in-law to maintenance is one of moral and not one of legal obligation enforceable by a suit—see *Ganga Bai v. Sita Ram* (1). Such also appears from the judgment of Sir Charles Sargeant, C.J., and Mr. Justice Nanabhai Haridas in *Kalu v. Kashibai* (2) to be the law in Bombay. Sir Barnes Peacock, C.J., Mr. Justice Macpherson and Mr. Justice Norman in *Khetramani Dasi v. Kashinath Das* (3) apparently considered that such was the law applicable in the High Court at Calcutta.

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Under these circumstances it is necessary to consider whether or not the second contention of Pandit *Sundar Lal* is well founded. Mr. Justice Farran in his judgment in *Adhibei v. Cursandas Nathu* (4) seems to have considered that property acquired by inheritance was ancestral property. In the case before him the property which was in the hands of the defendant, Cursandas, had been the self-acquired property of his father, who was the father-in-law of the plaintiff Adhibai. Mr. Justice Farran at page 208 is reported to have said, "In considering whether a widowed sister-in-law is entitled to claim maintenance from her brother-in-law, with whom her husband was in his lifetime joint, the only question the Courts ask is, has such brother-in-law ancestral property in his hands," and at page 209 he is further reported to have said, "the authorities justify me, I consider, in holding as I do, that the defendant in this case is legally bound to provide the plaintiff with maintenance out of the property which he has inherited from his father Nathu Jadowji."

With the latter proposition we agree. Undoubtedly in this case, as in that before Mr. Justice Farran, the widow's husband, her father-in-law and mother-in-law the defendant, had all been members of a joint Hindu family, but of a Hindu family in which there was during the lifetime of her husband or that of her father-in-law no joint or ancestral property as we understand the term and no property in which her husband ever had any right or interest except the bare contingent right of inheritance in case of the father not disposing of the property and of the husband surviving him. We

(1) I. L. R., 1 All., 170.

(2) I. L. R., 7 Bom., 127.

(3) 2 B. L. R., A. C., 15.

(4) I. L. R., 11 Bom., 199.

1888 fail to see how that property which during the lifetime of the plaintiff's husband or that of her father-in-law, never was joint or ancestral property, became, so far as the plaintiff was concerned, ancestral property on the death of her father-in-law, which was subsequent to that of her husband. The plaintiff's husband never had any share, nor any vested interest in any share in the property which came to the defendant's hands; he was simply during his lifetime a member of a joint Hindu family in which there was no joint or ancestral property; his death prior to that of his father, as the result showed, prevented his obtaining any vested right or interest in the property; he had not been excluded from any share in the property, and at the time of his death had not, nor had the plaintiff, any right of maintenance out of the property.

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We do not infer from the judgments referred to in page 208 of the report of Mr. Justice Farran's judgment, that Sir Michael Westropp, C.J., Norman, C.J., or Sir Barnes Peacock, C.J., would have considered that the property in question could, so far as the plaintiff is concerned, be described as "ancestral property."

In the case of *Savitribai v. Luximibai* (1) according to the report of the judgment delivered by Sir Michael Westropp, C.J., that learned Judge in giving his reasons for holding that the plaintiff's suit before him must fail, appeared to have distinguished between ancestral estate and estate of the plaintiff's husband or his father. He stated the second reason why the plaintiff's suit must fail as follows:—"because at the time of the institution of the plaintiff's suit, there was not, in the possession or subject to the disposition of Sadasiv any ancestral estate, or estate of the plaintiff's husband or his father."

We are, however, of opinion that there was a moral obligation on Khiali Ram, not only to maintain his widowed daughter-in-law during his lifetime, but also, as he had self-acquired property which he could have made available for a provision for her future maintenance, to make such provision for her maintenance after his death, and that such moral obligation in Khiali Ram became by reason of the

(1) I, L. R. 2 Bom., 573.

self-acquired property of Khiali Ram having come by right of inheritance into the hands of Nand Ram, a legal obligation enforceable by suit against the defendant Nand Ram and the property in question. Chief Justice Norman considered that a Hindu heir takes property subject to a legal obligation of maintaining persons "whom the deceased proprietor was morally bound to maintain" [see his judgment in *Rajjomoney Dossee v. Shibchunder Mullick* (1)]. It is true that the passage in his judgment to which we refer was merely obiter, and further that the authorities which he quotes do not, so far as we understand them, go quite so far. In referring to that case Sir Barnes Peacock, C.J., in his judgment in *Khetramani Dasi v. Kashinath Das* (2) says, "The rule laid down in *Rajjomoney Dossee v. Shibchunder Mullick* (1), namely, that the maintenance of a son's widow is a mere moral duty on the part of her father-in-law and that the case is distinguishable from those in which an heir takes property subject to the obligation of maintaining persons who are excluded from inheritance, or those whom the deceased proprietor was morally bound to maintain, appears to me to be correct. The obligation of an heir to provide out of the estate which descends to him maintenance for certain persons whom the ancestor was legally or morally bound to maintain is a legal as well as a moral obligation, for the estate is inherited subject to the obligation of providing such maintenance." This also was apparently, so far as this particular point is concerned, merely an *obiter dictum*, and we infer from the passage in his judgment which we shall immediately quote that Sir Barnes Peacock had some doubt as to whether the proposition had not been too broadly stated by him.

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The passage we refer to is to be found at page 35 of the report and is as follows:—"If a son takes his father's estate, or a widow her husband's estate by inheritance, it is only reasonable that they should be held legally liable to do what the father or husband was morally liable to do, and which it is to be presumed he would have done out of the estate if he had lived; but I am not sure that even in such cases the legal liability is carried to that extent."

(1) 2 Hyde., 103.

(2) 2 B.L.R., A. C., at p. 34.

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The reason why Sir Barnes Peacock considered that such legal obligation in the case of a widow arose appears in the following passage which we quote from page 35 of the report of his judgment:—"The maintenance of a widow being a moral obligation on the late proprietor, the son who inherits takes the estate not for his own benefit but for the spiritual benefit of the late proprietor, and he ought to perform the obligation of maintaining the widow." This view of the law seems to us to be equitable and according to good conscience and to be one which we may apply, in these Provinces.

In saying this we do not overlook the fact that the Mitakshara is the ruling authority in these Provinces and that "propinquity, according to the Mitakshara, is the ruling law of inheritance. The propinquity is consanguineous, according to Visvesara Bhatta and Balam Bhatta, two eminent commentators of the Mitakshara, and it is measured, says Mitra Misra, the great expounder of the Benares school, by the spiritual benefits conferred on the deceased proprietor. Spiritual benefits, says the author of the Viramitrodaya, furnish the great test of consanguineous propinquity. Spiritual benefits, he adds, cannot create the heritable right, it is true; but it determines with precision the preferable right of gotrajas and other heirs, where there is more than one claimant to the heritage." The passage which we have just quoted is from the Tagore Law Lectures of 1880 at pages 647 and 648.

The case under consideration appears to us to be analogous to that in which a son who has inherited property from his father is bound to carry out what his father has promised for religious purposes (Katyayana, 1 Dig. 229, Mayne on Hindu Law and Usage, para. 276, 3rd ed.) and to the liability of a brother who has assets from his father in his hands to provide for the marriage expense of his sister. We are not aware that it has ever been decided that the obligation of a father to provide for the marriage expenses of his daughter is higher than a moral obligation. On this question of marriage expenses we refer to Colebrooke's Digest,

Volume 2, paras. 121, 125, and 420, and to *Tulsha v. Gopal Rai* (1).

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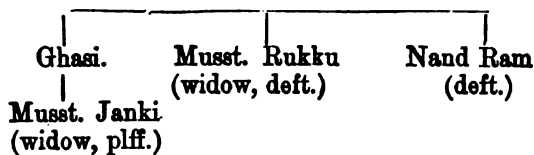
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We are of opinion that this appeal should be allowed, the decree of the Subordinate Judge set aside, and the case remanded under s. 562 of the Code of Civil Procedure to the lower appellate Court to be disposed of on the merits according to law. We are also of opinion that the costs should abide the result.

MAHMOOD, J.—I am of the same opinion. The facts of this case are simple, but the question of law which they raise is important, and not free from difficulty.

The following table shows the relative position of the parties —

Khiali Ram.



The property to which the litigation relates has been found by the Courts below to be the self-acquired property of Khiali Ram, a Hindu of the Vaishya caste, whose inheritance is admittedly governed by the rules of the Mitakshara law. It has further been admitted by the learned pleaders of the parties that the family resided together as a joint Hindu family.

During his nonage Ghasi was married to the plaintiff Musammat Janki, who was herself a minor at the time, and it has been found that "the *gauna* ceremony of the plaintiff was not even performed," when Ghasi died during the lifetime of his father, mother and brother. It must, therefore, be taken as a finding of fact that the plaintiff never cohabited with her husband as man and wife, and that her position is now that of a virgin widow.

Khiali Ram died about nine months before the suit leaving a son Nand Ram and a widow Musammat Rukku, both of whom are defendants to this action.

The action was brought by Musammat Janki for recovery of Rs. 8-0-0 per mensem as maintenance from the 1st August, 1886,

(1) I. L. R., 6 All., 682.



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as a charge upon certain moveable and immoveable properties mentioned in the plaint as forming the estate of the deceased Khiali Ram inherited by the defendant Nand Ram and now in his hands.

The suit was resisted upon various grounds which need not be stated for the purposes of this appeal, beyond the solitary ground upon which the lower appellate Court has concurred with the first Court in dismissing the suit.

That ground is that the plaintiff's husband Ghasi having pre-deceased his father, Khiali, inherited nothing, and the property being the self-acquired property of Khiali, it devolved by inheritance upon his surviving son Nand Ram, unencumbered with any such charge of the plaintiff's maintenance as she claimed in the suit.

In support of this second appeal it has been argued that the view adopted by the lower Courts proceeds upon a misapprehension of the Hindu law, and that the plaintiff-appellant's claim should have been decreed. In maintaining this proposition Pandit *Sundar Lal* for the appellant has contended that although the property in the hands of Khiali was self-acquired, and as such free from any legal liability to the maintenance of the plaintiff, it became ancestral property upon the death of Khiali, and must be regarded as such in the hands of Nand Ram defendant for purposes of this suit, and that the property is therefore subject to the charge of the plaintiff's maintenance as claimed. In support of this contention the ruling of the Bombay High Court in *Adhibai v. Cursondas Nathu* (1) has been cited. In that case Farran, J., relying upon some older rulings, came to the conclusion that where the property was the self-acquired property of the deceased father-in-law, the widow of a pre-deceased son could claim maintenance from her husband's brother who had succeeded to the estate of his father, that is, the widow's father-in-law. The learned Judge also held that such property must be dealt with as ancestral property in the hands of the brother-in-law and as such liable to the widow's claim for maintenance. The learned Judge further held that the widow (plaintiff) being legally entitled to claim maintenance from her brother-in-law

(1) I. L. R., 11 Bom., 199.

the defendant, she was entitled to separate maintenance, and that the defendant could not insist upon her living in his house.

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The rulling, no doubt, goes the whole length of Pandit *Sundar Lal's* contention; but that contention is resisted on behalf of the respondents, on two main grounds. The *first* is that inasmuch as the property was the self-acquired property of Khiali, neither he personally nor the estate in his hands was liable to the plaintiff's claim for maintenance. The *second* is that the property not being ancestral in the hands of Khiali, his son the deceased Ghasi had no vested interest in the property, and having predeceased his father, no kind of interest in the estate of Khiali could devolve upon the plaintiff even in respect of maintenance. In support of this latter part of the argument it has been urged that the maintenance of a widowed daughter-in-law by the father-in-law being a purely moral obligation under the Hindu law, the obligation cannot convert itself into a legal obligation by the mere fact of the father-in-law's death and the devolution of his estate by inheritance on his surviving son. It has also been urged that the solitary text in such cases is the general rule of Hindu law that the obligation to maintain the widow is not absolute, but is conditioned upon the fact of the person against whom maintenance is claimed having inherited the property of her late husband, and that where this condition is not satisfied, the widow's claim for maintenance cannot prevail (Tagore Law Lectures, 1879, p. 446).

In dealing with this contention, it seems to me advisable to state briefly some propositions of Hindu law which are settled by authority and form steps of the reasoning upon which my judgment will proceed.

The *first* proposition is that a widowed daughter-in-law has no legal right to claim maintenance from her father-in-law who has only self-acquired property in his hands, and that the obligation to maintain her out of such property is a merely moral and not a legal obligation on the part of the father-in-law. For this proposition *Rajjomoney Dossee v. Shibchunder Mullick* (1) *Khetra*

(1) 2 Hyde., 103.

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 and *Kalu v. Kashibai* (3) which followed the earlier Full Bench  
 ruling in *Savitribai v. Lazimibai* (4) are distinct authorities.

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The second proposition is that a widowed daughter-in-law is entitled to claim maintenance from her father-in-law who was in possession of the joint ancestral estate of the family of which her deceased husband was a member under the Mitakshara law and had predeceased his father. The Full Bench ruling of this Court in *Musammatt Latti Kuar v. Ganga Bishan* (5) is authority for this proposition, and is in accord with the ruling of the Madras High Court in *Visalatchi Ammal v. Annasamy Sastry* (6).

But neither of these two propositions covers the question now before us, *viz.*, whether a widowed daughter-in-law is entitled to claim maintenance out of the self-acquired estate of her father-in-law who, dying intestate, has left the property to be inherited by his surviving son.

In considering this question I have felt some difficulty in consequence of the fact that even under the Benares school of the Mitakshara law, the son does not by his birth acquire any vested or even what has been called "*inchoate*" interest in his father's self-acquired property, and that a Hindu widow cannot in respect of the inheritance of such property represent her husband by any such rule as the doctrine of *jus representationis*. The result is that (to use the words of Mr. Mayne's work on Hindu law, s. 452) "she can only succeed to his property or rights, that is, to the property which was actually vested in him, either in title or in possession, at the time of his death. She must take at his death or not at all. No fresh right can accrue to her as widow in consequence of the subsequent death of some one to whom he would have been heir if he had lived. Hence no claim as heir can be set up on behalf of the widow of a son, &c.,"

In the present case therefore it is clear that the plaintiff's husband Ghasi had no vested interest in Kihali's self-acquired pro-

(1) 2, B. L. R., 15 Ac.; 10 W. R., 89 F. B.

(2) I. L. R., 1 All., 170.

(3) I. L. R., 7 Bom., 127.

(4) I. L. R., 2 Bom., 573.

(5) N. W. P. H. C. Rep. 1875, p. 261.

(6) 5 Mad., H. C. Rep., 150.

perty, and that the plaintiff could not therefore have any interest in the inheritance from Khiali. Her rights must therefore depend upon some principle of the Hindu law other than the rules of inheritance by widows.

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It has been argued that since the plaintiff's husband Ghasi never lived long enough to acquire any vested interest in his father, Khiali's self-acquired property, therefore the defendant Nand Ram inherited that property by direct succession to Khiali and cannot be regarded as in possession of any portion of the property either as the inheritor or successor by survivorship of his brother Ghasi's share. And on the basis of this contention we are asked to hold that the plaintiff is not entitled to any maintenance out of the estate of Khiali even in the hands of the defendant Nand Ram. In support of this contention the following passage from the *Smriti Chandriha* has been relied upon:—

“In order to maintain the widow, the elder brother or any of the others above-mentioned must have taken the property of the deceased, the duty of maintaining the widow being dependent on taking the property” (Chapter XI, s. 1, s. 34).

This passage as understood by Mr. Mayne (*Hindu Law*, s. 375, p. 418) and Dr. Trailokyanath Mitra, *Tagore Law Lectures*, 1879, pp. 444-46) no doubt favours the contention for the defendants-respondents; but having considered the matter, I am of opinion that the rule cannot be understood to be exhaustive in the sense of excluding the widow's right of maintenance when such right may arise from other rules of the Hindu law than the doctrine to which the text refers. Without therefore questioning the authority of the text or the accuracy of the rule which that text contains, I hold that under the circumstances of this case the plaintiff is entitled to claim maintenance out of the self-acquired property of Khiali Ram when in the hands of his son and heir, the defendant, Nand Ram.

The steps of reasoning which lead me to the conclusion are—

(1)—A Hindu father is under a *moral*, if not a *legal*, obligation to give his daughter in marriage.

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(2) By marriage a Hindu woman ceases to belong to her parental family and becomes a member of her husband's family.

(3) The head of a Hindu family is bound *morally*, if not *legally*, to provide for the maintenance of all the members of the family according to the various rules applicable to the claims of each class of members.

(4) Although a father-in-law in possession only of self-acquired property is not *legally* compellable to maintain his son's widow, yet the Hindu law imposes a *moral* obligation on him to provide for her maintenance.

(5) An *essential* element of the son's right of inheritance from his father is the spiritual benefit which in the contemplation of the Hindu law the son confers upon the soul of his deceased father.

(6) Therefore the son inheriting the self-acquired property of his father takes that property subject to such *moral* obligations as are conducive to the spiritual benefit of his father, and that such *moral* obligations become *legal* obligations as against the son who holds his father's property by inheritance.

I shall deal with each of these points *seriatim*.

As to the *first* point, I refer to the text of Manu where he says:—"Reprehensible is the father, who gives not his daughter in marriage at the proper time" (Chapter IX, s. 4); also to the text of Katyayana, who says: "If a damsel, yet unmarried, arrive at puberty in the house of her father, he is guilty of infanticide by detaining her at a time when she might have been a mother; and the damsel is held degraded to the servile class" (Colebrook's Digest of Hindu Law, 3rd ed., vol. II, p. 297). It was no doubt with reference to these precepts of the Hindu law which are also fortified by the usage of the Hindus, that the father of the plaintiff Musammat Janki gave her in marriage to the deceased Ghasi before she had attained the age of puberty. And I may here say that under the Hindu law marriage is not a civil contract as it is in some other systems of jurisprudence, but is a sacrament (*vide* Dr. Gurudas Banerjee's Tagore Law Lectures, 1878, p. 30) which, so far as the

woman is concerned, ranks as high as the ceremony of *Upanayana* or investiture of the sacred thread in the case of males, a ceremony which implies regeneration or second birth in the contemplation of the Hindu law as explained by me in *Ganga Sahai v. Lekhraj Singh* (1). "To use the words of Manu, the nuptial ceremony is considered as the complete institution of women, ordained for them in the *Veda*" (Manu, Chap. II, s. 67, see also s. 66).

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As to the *second* point I need only repeat the language of Mr. Justice West and Dr. Buhler in their work on Hindu law (3rd ed., p. 129) to the effect that the daughters by their marriage pass into another family or, as the Hindu lawyers say in their expressive language, "are born again in the family of their husbands." I have no doubt that this is an accurate proposition of the Hindu law of marriage, at least so far as the Benares school, which governs this case, is concerned.

Then comes the *third* point as enunciated by me, and in dealing with it I cannot do better than adopt the words of Sir Thomas Strange (Hindu Law, vol. i, p. 67), who says:—

"Maintenance by a man of his dependents is, with the Hindus, a primary duty. They hold that he must be just before he is generous, his charity beginning at home; and that even sacrifice is mockery, if to the injury of those whom he is bound to maintain. Nor of his duty in this respect are his children the only objects, co-extensive as it is with his family, whatever be its composition, as consisting of other relations and connections, including (it may be) illegitimate offspring. It extends to the outcast, if not to the adulterous wife, not to mention such as are excluded from the inheritance, whether through their fault or their misfortune; all being entitled to be maintained with food and raiment at least, under the severest sanctions."

This passage is supported by the text upon which the learned author has relied; but I am anxious to quote a passage from more recent authority (Dr. Gurudas Banerjee's *Tagore Law Lectures*, 1878, p. 210):—

(1) I. L. R., 9 All. 253.

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"We have hitherto been considering the claim of a widow for maintenance against the person inheriting her husband's estate. The question next arises how far she is entitled to be maintained by the heir when her husband leaves no property, and how far she can claim maintenance from other relatives. The Hindu sages emphatically enjoin upon every person the duty of maintaining the dependent members of his family. The following are a few of the many texts on the subject:—*Manu*:—'The ample support of those who are entitled to maintenance is rewarded with bliss in heaven; but hell is the portion of that man whose family is afflicted with pain by his neglect: therefore let him maintain his family with the utmost care.' *Narada*:—'Even they who are born, or yet unborn, and they who exist in the womb, require funds for subsistence; the deprivation of the means of subsistence is reprehended.' *Brihaspati*:—'A man may give what remains after the food and clothing of his family; the giver of more who leaves his family naked and unfed, may taste honey at first, but shall afterwards find it poison.'"

To these texts I may add the following from *Manu* (Chap. XI, ss. 9 and 10:

"He who bestows gifts on strangers, with a view to worldly fame, while he suffers his family to live in distress, though he has power to support them, touches his lips with honey, but swallows poison; such virtue is counterfeit: even what he does for the sake of his future spiritual body, to the injury of those whom he is bound to maintain, shall bring him ultimate misery both in this life and in the next."

All these texts read together in the spirit of the Hindu law, leave no doubt in my mind that at least in point of religious or spiritual and moral obligation, maintenance of the dependents of a family is an obligation resting on the head of a Hindu family.

From this proposition the answer to the *fourth* point follows, for it is a corollary from what has already been said on the preceding point. I may now, however, refer to the text of *Sancha*:—

“To the childless wives of brothers and of sons, strictly observing the conduct prescribed, their spiritual parent must allot mere food and old garments which are not tattered.” (Colebrooke’s Digest, vol. ii, p. 538.) And I may also say that the *ratio decidendi* of all the rulings of the various High Courts which I have already cited, whilst negating the legal right of a widowed daughter-in-law to claim maintenance from her father-in-law who is in possession only of self-acquired property, recognize and proceed upon affirming the proposition that her maintenance, though falling short of a *legal* right, is a *moral* obligation resting on the father-in-law. So far all those rulings are unanimous, and I do not think any such argument has been addressed to us as would require me to go behind the *ratio decidendi* of those rulings, or to regard what was said there as to the *moral* obligation of the father-in-law as mere *obiter dicta*.

In dealing with the *fifth* point, I wish to begin by adopting the language of a well-know Hindu lawyer, Mr. Sarvadhikari, in his work on Hindu inheritance (Tagore Law Lectures, 1880, p. 12), where after referring to the Roman system of inheritance, the learned author summarizes the principle of the Hindu law as to the right of inheritance:—

“The Hindu system went further, and laid it down as an imperative rule, that the right to inherit a dead man’s property is exactly co-extensive with the duty of performing his obsequies. The devolution of property depends upon the competence to perform the obsequial rites of the deceased. They cannot be separated. He who is entitled to celebrate these rites is also entitled to inherit the property; and he who gets the property must perform the funeral rites of the last owner. If there are no relatives who are legally competent to perform them, the law of succession does not apply, and the property escheats to the crown. The king takes the property as an heir, and, as such, is also bound to discharge all the obligations of an heir. He must cause the last rites to be performed for the deceased, and must also see that they are periodically celebrated on the appointed days. The “water” and the “cake” are essentially necessary for the lasting peace of the soul of the deceased, and he

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who inherits his property must perform ceremonies which would conduce to his spiritual welfare. Hindu law has thus inseparably connected the duty of presenting the "water" and the "cake" with the right of inheritance, and this makes it absolutely necessary that a clear conception should be gained of the *śradha* rites which form the basis of the Hindu law of inheritance."

The same is the effect of what Mr. Mayne says (Hindu Law, s. 9):—

"The principle that the right of inheritance, according to Hindu law, is wholly regulated with reference to the spiritual benefits to be conferred on the deceased proprietor, has been laid down on the highest judicial authority as an article of the legal creed, which is universally true, and which it would be heresy to doubt." And the learned author re-affirms the doctrine in s. 423 of his work, and cites the authority of certain rulings of the Privy Council.

It has been suggested in the course of the argument at the bar that this principle is applicable only to the Bengal school and is repudiated by the Mitakshara school of the Hindu law. Some apparent countenance is given to this argument by what Mr. Mayne says in s. 433 of his work: "When we go a stage back to the Mitakshara, and still more to the actual usage of those districts where Brahminical influence was less felt, the whole doctrine of religious efficacy seems to disappear."

I am afraid, and I say this with all respect due to such an eminent author, that the sentence taken by itself is somewhat unguardedly expressed. The Mitakshara and the Bengal schools do not differ with each other in the principle that the right of inheritance itself is based on and arises from the contemplation of the Hindu law that the inheritor by taking the inheritance renders spiritual benefits to the soul of the deceased proprietor. The principle is common to all schools of Hindu law, and the difference between the Benares school and the Bengal school on this point is a matter of detail relating to questions of preference where there is competition between various classes of heirs. The matter is well described by Mr. Sarvadhikari (Hindu Law of Inheritance, pp. 647-8): "*Propin-*

*quity* according to the Mitakshara, is the ruling principle of the law of inheritance. This propinquity is *consanguineous* according to Visvesvara Bhatta and Balom Bhatta, the two eminent commentators of the Mitakshara; and it is measured, says Mitra Misra, the great expounder of the doctrines of the Benares school, by the spiritual benefits conferred on the deceased proprietor. Spiritual benefits, says the author of the Viramitrodaya, furnish the great test of consanguineous propinquity. Spiritual benefit, he adds, cannot create the *heritable right*, it is true; but it determines, with precision, the *preferable* right of gotrajas and other heirs, where there is more than one claimant to the heritage."

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But whatever may be the difference between the various schools of the Hindu law as to heirs in (competition with each other for inheritance, there can be no doubt that there is no difference as to the principle upon which the son's right of inheriting his father's property is concerned. The principle really rests on the religious doctrine inculcated by Manu (Chap. IX, ss. 137-38): "By a son, a man obtains victory over all people; by a son's son he enjoys immortality; and afterwards, by the son of that grandson, he reaches the solar abode. Since the son (*trayate*) delivers his father from the hell named *put*, he was, therefore, called *puttra* by Brahma himself."

This religious precept is indeed the foundation of the law of marriage, which, as I have already said, is a sacrament in Hindu law, (Tagore Law Lectures, 1878, pp. 30 and 31), having for its object the procreation of offspring as a means of salvation; it is also the foundation of the law of adoption, whereby the adopted son acquires the right of inheriting his adoptive father's property, as stated by me in *Ganga Sahai v. Lekhraj Singh* (1); and it is also the foundation of many other rules of the Hindu law which I need not here specify. The broad result is that a son has the right of inheriting his father's property, because the son is the means of conferring spiritual benefits upon the deceased father by delivering his father's soul from the hell named *put*.

(1) I. L. R., 9 All. 253.

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The sixth point in the case is in my opinion the necessary outcome of the views which I have expressed upon the preceding five points. Mr. Mayne in his work on Hindu law, (Chap. IX, ss. 272, 276) has explained the origin and extent of the son's obligation to pay his father's moral debts, and the learned author points out that "in the view of Hindu lawyers, a debt is not merely an obligation but a sin, the consequences of which follow the debtor into the next world." He then shows that originally the son's liability to discharge the father's obligations was independent of paternal assets, and he summarises the present law by saying :—

"The liability to pay the father's debt arises from the moral and religious obligation to rescue him from the penalties arising from the non-payment of his debts. And this obligation equally compels the son to carry out what the ancestor has promised for religious purposes. It follows, then, that when the debt creates no such moral obligation, the son is not bound to repay it, even though he possesses assets. This arises in two cases, 1st, when the debt is of an immoral character ; 2nd, when it is of a ready-money character " (s. 276).

This, I think, correctly represents the present state of the Hindu law as administered by our Courts. I may, however, cite a passage from *Naradiya Dharmasastra* or the Institutes of Narada in Dr. Jolly's translation (Chap. III, s. 25) as being pertinent to the present case :—

"Of the successor to the estate, the guardian of the widow, and the son, he who takes the assets becomes liable for the debts ; the son if there be no guardian of the widow, nor successor to the estate ; and the person who took the widow if there be no successor to the estate, nor son."

I think I may safely say here that in this text as also in other similar original texts of the Hindu law, the word "*debt*" is to be understood in a broad sense so as to include all classes of obligations, such as moral obligations in respect of maintaining widow daughters-in-law, and expenses of the marriage of unmarried daughters

I do not consider it necessary for the purposes of this case to enter into a discussion as to the exact nature and extent of the son's liability to pay his father's debts. The question has been settled by the ruling of the Privy Council in *Girdharee Lall v. Kantoo Lall* (1) and other subsequent rulings. I may, however, say that the general effect of the *ratio* adopted in those rulings is to emphasize the principle that it is a pious duty on the part of the son to pay his father's debts, and even ancestral property in which the son, as son, acquires an interest by birth, under the Mitakshara law, is liable to the father's debts unless they have been contracted for immoral purposes. I do not wish to pursue the subject further, because a much closer analogy is available for the purposes of this case.

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That analogy is to be found in the liability of a son to pay the marriage expenses of an unmarried sister out of the estate which he has inherited from his father, even if such estate was the self-acquired property of the father. Now in the course of the argument, I asked Mr. *Madho Prasad* for the respondents to point out any authority either of original texts or of decided cases which would go to show that the obligation of a father to give his daughter in marriage rests upon any foundation other than the religious and moral precepts which I have already cited in considering the first point. In other words, I have been anxious to ascertain whether under the Hindu law the obligation of the father in respect of defraying his daughter's marriage expenses was a *legal* obligation, so as to render him compellable by action in a Court of Justice. But the learned pleader has been unable to point out any such authority, and my own efforts in this direction have proved equally fruitless. I think I am therefore justified in laying down the proposition that under the Hindu law a father in possession only of self-acquired property is bound only by religious and moral precepts to give his daughter in marriage, and that he is not legally compellable in this respect in a Court of law. To use the words of the Lords of the Privy Council in *Jumona Dassya Chowdhurani v. Bama Soondare Dassya Chowdhurani* (2), "The foundation upon which marriages between

L. R. 1 I. A., 321. (2) L. R. I. A., 72.

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infants which so many philosophical Hindus consider one of the most objectionable of their customs rest is the religious obligation which is supposed to lie upon parents of providing for their daughter, so soon as she is *matura virgo*, a husband capable of procreating children; the custom being that when that period arrives, the infant wife permanently quits her father's house, to which she had returned after the celebration of the marriage ceremony, for that of her husband."

There being thus no *legal* obligation upon the father to provide a husband for his daughter, or to pay her marriage expenses, I proceed to show that the obligation which was only a *moral* or religious obligation resting upon the father, becomes a legally enforceable obligation as against the son who has inherited the property of his father, even though such property is only self-acquired property of the father. In other words, what was a mere *moral* obligation on the father matures itself into a *legal* obligation against the brother. I think I may at once say that there is an unusual paucity of case law on the subject of Hindu marriage, and I agree in the view of the learned author of the *Hindu Law of Marriage* (Tagore Law Lectures, 1878, pp. 32-3) when he states that the scantiness of the case law is due to the devotional character of the Hindu population, and I may add probably also to the fact that the law-abiding tendencies of the Hindus of the better classes have precluded brothers from disputing the right of unmarried sisters to obtain their marriage expenses out of the paternal estate when in the hands of the brothers by inheritance. Indeed, the only reported case involving such a question is *Tulsha v. Gopal Rai* (1), which my brother Tyrrell has pointed out to me and which as he noticed was not a dispute between own sisters and brothers, but between unmarried sisters and their half-brother by the second wife of the deceased father. In that case the right of the sisters to claim their marriage expenses from the paternal estate does not seem to have been seriously questioned, and my brethren Straight and Brodhurst concurred in saying :—

(1) I. L. R., 6. All., 632.

“At the time the suit was brought, both the girls were of a marriageable age, it was only in accordance with Hindu law that a sum of money suitable to their condition and the custom of their family should be secured against their marriage taking place.”

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I am not aware of any other reported case on the subject; and I cannot help feeling that the main reason for the paucity of the case law is that no Hindu brother in possession of his father's assets would deny his obligation to defray the marriage expenses of his unmarried sisters.

But because there is such paucity of case law on the subject, I am anxious to cite some original texts of the Hindu law as authorities in support of my opinion. I think I need only refer to the text of *Vishnu*.

The marriage and other ceremonies of unmarried daughters must be defrayed in proportion to the wealth *inherited*.”—(Colebrooke's Digest, vol. ii, p. 295.)

Again there is a text of *Devala*: “A nuptial portion shall be given to *unmarried* daughters out of their father's estate.” (*Ib.*, p. 296, see also p. 543, Text CCCCXX).

I think these texts are quite enough for the purposes of the analogy which I have introduced between the rights of a brother's widow for maintenance and the right of an unmarried sister to claim marriage expenses from her brother who is in possession of the father's estate. The whole object of the analogy of course is to furnish the necessary step of reasoning upon which my judgment proceeds, namely, that under the Hindu law purely moral obligations imposed by religious precepts upon the father ripen into legally enforceable obligations as against the son who inherits his father's property.

That this principle is not entirely an original supposition of my own is shown by what Norman, C.J., said towards the end of his judgment in *Rajjmoney Dossee v. Shibchunder Mullick* (1) and by Peacock, C.J., in the case of *Khetramani Dasi v. Kashinath Das* (2), both of which dicta have been quoted and followed by Farran, J., in

(1) 2 Hyde, 103.

(2) 2 B. L. R., A. C., 15.

1881 the judgment which he delivered in *Adhibai v. Cursandas Nathu* (1).  
 JANKI The effect of these authorities can be best represented in the  
 v. words of Dr. Gurudas Banerjee, (who, I am glad, has recently  
 NAND RAM. received a well-merited seat on the Bench of the Calcutta High  
 Court) in his *Hindu Law of Marriage* (Tagore Law lectures, 1878,  
 p. 214), where the learned author, referring to Sir Barnes Peacock's  
 judgment in *Khetramani Dasi v. Kashinath Das* (2), points out  
 "that an important general rule has been laid down regarding a per-  
 son's liability to provide maintenance for others. That rule is this,  
 that the heir of a person taking his estate is legally bound to maintain  
 all those whom the late proprietor was either *legally* or *morally*  
 bound to maintain; for the heir takes the estate of the ancestor for  
 his *spiritual* benefit. Thus in this instance, what was a mere *moral*  
 obligation in the ancestor, becomes transformed into a *legal* obliga-  
 tion in his heir."

I fully accept this view of the law, and now proceed to  
 mention some of the early reported cases in the subject. In 1820  
 the late Sadr Diwani Adalat of Bengal in deciding the case of  
*Rai Sham Bullubh v. Prankishen Ghose* (3), held that the widow  
 of a son who died before his father was entitled to food and  
 raiment only from those who had inherited her father-in-law's  
 estate. The same is the tendency of the ruling in *Musammatt*  
*Himutta Chowdrayn v. Musammatt Pudoomunes Chowdrayn* (4)  
 which was decided in 1825, and of another case decided in 1852  
 and reported at p. 796 of the Calcutta Sadr Diwani Reports for  
 that year. The learned Judges in that case said that "it was  
 unnecessary to call for a *bywasta*, as according to the Hindu law  
 and the established precedents of the Court, the widow is entitled  
 to maintenance from the heir of the family." I have referred to  
 these cases merely incidentally, because the reports are so meagre  
 that they are silent as to whether the property out of which main-  
 tenance was claimed was ancestral property or self-acquired property  
 of the father-in-law from whom the defendants had inherited.  
 Those cases therefore do not necessarily cover the whole ground of

(1) I. L. R., 11 Bom., 199.

(2) 3 S. D. A., L. P., 33.

(3) 2 B., L. R., A. C.

(4) 4 S. D. A., L. P., 19.

the point now before us, and I am afraid cannot be regarded as of much value as authorities upon the question which we are called upon to decide in this case.

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But I think I have said enough to show that, irrespective of these old cases, there are enough indications in the original texts of the Hindu law itself and indeed in the whole spirit of that system of jurisprudence to justify the conclusion at which I have arrived in this case as a pure question of legal decision. But because the case is not altogether free from difficulty, and also because our judgment in this case will go very near the boundary of what is sometimes described as "*judicial legislation*," I am anxious, before concluding my judgment, to refer to some considerations of good policy from which I confess my mind has not been altogether free in determining the question raised in this case. When I say good policy I do not refer to any political exigencies of the population of the territories under the jurisdiction of this Court. I use the phrase in the sense in which such a phrase should be understood in judicial exposition of the law, that is in the sense of those broad principles which ordain the basis of the rule of justice, equity, and good conscience upon which we, as Judges of a Court which exercises the combined jurisdiction of a Court of law and a Court of equity, must act in cases where there is no specific legislative provision in the statute law, or the original texts of an ancient system of jurisprudence, which we are bound to administer, do not furnish an express authority in specific terms. In regarding the matter in this light, I am fortified by the example of Norman, C.J., in *Khetramani Dasi v. Kashinath Das* (1) where that learned Judge clearly indicated that in considering such questions, considerations of natural law, equity and good conscience were not to be lost sight of. And in regarding the matter in the same light here, I cannot refrain from pointing out that whilst in fact marriages are almost enjoined by the Hindu law, especially in the case of females, it is far from being certain that the re-marriage of Hindu widows is permitted by the Hindu law texts. To use the words of Manu, the marriage of a widow is not "even named in the laws concerning marriage" (Manu, Chapter

(1) 2 B. L. R., A. C. 15.



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IX, ss. 64, 65), and the sacred writer goes on to say:—"This practice, fit only for cattle, is reprehended by learned Brahmans." (*ib.* s. 65).

An exceptional piece of legislation, Act XV of 1856, which legalizes the marriage of Hindu widows, has in deed found place in the Statute Book of British India. The history and effect of the legislation are described by Dr. Gurudas Banerjee (*Tagore Law Lectures* for 1878, pp. 264—73); but I do not think it is going too far to say that, notwithstanding that enactment, the remarriage of widows is still abominable in the eyes of the Hindus of the three higher castes, and that the probable, if not the inevitable, result of such remarriages would be the outcasting of the widow and her second husband, if not also of those who took part in or encouraged such re-marriage. In saying so I refer to matters such as those which the Madras High Court had to consider in *The Queen v. Sri Vidya Sankara Narasimha Bharathi Guruswamulu* (1). And I consider it entirely within the province of judicial usage to take notice of this circumstance and not to lose sight of it in dealing with such questions. I take it as a proposition which neither of the learned pleaders of the parties, both of whom are Hindu gentlemen, would deny, that under the present conditions of the Hindu society in this part of India if the plaintiff Musammat Janki entered into matrimony by marrying a second husband, she would incur all the social and religious penalties of excommunication which the Hindu society of this part of the country recognises and acts upon. Judges are of course bound to administer the law as they find it, but where the statute law is silent, and the common law not free from doubt, they do not, especially in disputes arising out of the law of marriage, ignore the conditions, sentiments or prejudices, religious or social, which are held sacred by the population to which the law is administered.

It is in view of these legal principles of adjudication that I wish to quote a passage from an eminent Hindu lawyer, Krishna Kamal Bhattachargya (*Tagore Law Lectures*, 1885, page 323), who after referring to some rulings goes on to say:—

(1) I. L. R., 6 Mad., 381.

“To a Hindu mind not penetrated with European notions and still retaining the spirit of ancient Hindu law as propounded by *Rishis* and their earlier commentators, this exposition of the law relating to a widow’s maintenance would appear harsh and unsympathetic. The life of a Hindu female is one of seclusion; outside the *sanana* her knowledge is as limited as that of a tender child; culture training or education she has absolutely none. If her rights are invaded by the male members of the family, she is utterly helpless; and she falls under the influence of persons whose motives for lending her a help are the furthest from those of philanthropy or disinterested good will. Females belonging to the respectable classes are incapable of earning their own livelihood; if the family property is transferred by the male relations, what can these females do to keep their rights of maintenance secure?”

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I asked Mr. *Madho Prasad*, in the course of the argument, to suggest what answer his client Nand Ram would give to these questions. Would he propose that the girl widow Janki should marry a second husband, thus incapacitating herself for conferring any of those spiritual benefits upon his brother and her deceased husband, which the ecclesiastical ceremonies of the Hindu law and religion inculcate and ordain? Would he propose that this widowed girl should claim maintenance from her parental family, of which she, by reason of her marriage with the deceased Ghasi, has ceased to be a member, and as such entitled to no such legal right? Would he propose that this widowed girl should enter into some profession to earn a livelihood? Would he propose that if she is unfit, by reason of her sex and the condition of Hindu society, to adopt any respectable profession, that she should go begging in the streets for her bare necessities of life, thus exposing herself in her early month to all those temptations of immorality which the austerities prescribed by the Hindu law for the widow are intended to obviate and preclude?

The only answer to these questions which Mr. *Madho Prasad* for the respondent Nand Ram found it possible to suggest was, that I, sitting here as a Judge, should ignore all considerations of compassion and dispose of the case entirely upon the technicalities of

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the law and the rights of the parties. I am aware that such is my duty, but, as I have shown, the conclusions at which I have arrived are well supported by the entire spirit of the texts of the Hindu law itself and the principles of that system of jurisprudence. And if I have referred to the condition of the Hindu society in connection with such questions, it is only because I hold it to be a true proposition of law and judicial method, that in deciding such cases of contested interpretation sought to be placed upon ancient texts of a very ancient system of law, Judges of the present day in enforcing that system should not be oblivious of the requirements of the age and the exigencies, social, moral, and religious, of the population under their jurisdiction.

This view induces me, even at the risk of prolixity, to quote another passage from another Hindu lawyer of eminence upon a cognate subject. Dr. Gurudas Banerjee (Tagore Law Lectures, 1878, p. 213) referring to the case of *Khetramani Dossee v. Kashinath Das* (1) quotes the language of Norman, C.J., "upon the question whether a son's widow is entitled to be supported by her father-in-law if she resides in her house;" and the learned author goes on to say:—

"But as the question was not raised before the Court, the other Judges expressed no opinion upon it; so that it still remains an open question. Considering the constitution of Hindu society, considering the extremely helpless condition of the Hindu widow, and considering that the obligation of the father-in-law or other near relation to give her food and raiment if she resides in his house, is not only enjoined by precepts, but is also confirmed by invariable usage, it is hoped that should this question ever arise, it will be decided in favour of the widow."

These passages have been quoted by me not as governing the *exact* question now before us, but as indicating that the tendency of the Hindu jurisprudence, as understood by Hindu lawyers themselves, is in keeping with the conclusions at which I have arrived in this case. And because this judgment has grown to such length, I am anxious to guard myself against being understood to go behind

(1) 2 B.L. R., A. C. 15.

the rulings which have negatived the widowed daughter-in-laws' legal right to claim maintenance from her father-in-law who is in possession only of self-acquired property. Nor am I to be understood as laying down any rule as to the question whether or not the self-acquired property of a father-in-law in the hands of a surviving son is to be dealt with as "*ancestral property*" in the sense in which that expression is understood in the Hindu law. What I do lay down is that Khiali was found by moral and religious precepts to provide for the maintenance of his widowed daughter-in-law, of the plaintiff, that his self-acquired property inherited by his son, the defendant Nand Ram, was so inherited subject to the *moral* obligation of Khiali; that since the inheritance itself in the contemplation of the Hindu law arises for the *spiritual* benefits of the deceased owner, the son inheriting the property is *legally* bound to discharge those obligations which so long as the original acquirer of the property was alive, were only moral obligations. I also hold that the plaintiff's maintenance is a legal charge upon the property of Khiali in the hands of Nand Ram, and that the plaintiff, Musammat Janki, was therefore entitled to maintain this action.

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It now remains for me to consider the exact terms of the order which should be made in the case. I have already indicated at the outset that the suit was defended also upon some pleas of fact into which the lower appellate Court has not entered owing to the view of the law which that Court took as to the absence of the plaintiff's right to maintain the action. The case therefore is similar in principle, so far as this point is concerned, to the case of *Muhammad Allahdad Khan v. Muhommad Ismail Khan* (1) where the learned Chief Justice and I concurred in decreeing the appeal and remanding the case under s. 562 of the Code of Civil Procedure. For similar reasons the plaintiff's right to maintain the suit being established, I decree this appeal, and setting aside the decree of the lower appellate Court, remand the case to that Court for adjudication upon the merits of the other pleas set up by the defendants-respondents. Costs to abide the result.

*Cause remanded.*

(1) I. L. R., 10 All., 289.

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November 12.

## APPELLATE CIVIL.

*Before Mr. Justice Mahmood.*

**MAHADEO SINGH AND OTHERS (PLAINTIFFS) v. BACHU SINGH AND OTHERS (DEFENDANTS).\***

*Jurisdiction—Civil and Revenue Courts—Suit by co-sharers in a joint undivided mahal for declaration of title to receive proportionate share of rent and for recovery thereof—Denial of plaintiff's title by co-sharers-defendants—Suit not maintainable—Act XII of 1881 (North-Western Provinces Rent Act), ss 93 (A), 106, 148—Act I of 1877 (Specific Relief Act), s. 42—Civil Procedure Code, s. 11.*

The effect and intention of the proviso to s. 148 of the North-Western Provinces Rent Act (XII of 1881) is to preserve the jurisdiction of the Civil Courts under s. 42 of the Specific Relief Act (I of 1877), while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as s. 148 contemplates. Neither that section nor the proviso affects the jurisdiction of a Civil Court to entertain a suit by some of a body of co-sharers in a joint and undivided mahal for a declaration of their title to receive a proportionate share of the rent payable by the tenants.

Having regard to s. 11 of the Civil Procedure Code, a suit for the recovery of certain sums of money as the plaintiff's share of rent alleged by them to have been wrongfully received by the defendants, their co-sharers, and in which the plaintiff's right to receive any portion of the rent claimed is denied by the defendants, is not barred from the cognizance of the Civil Courts by s. 93 (A) of the North-Western Provinces Rent Act. That provision does not contemplate suits in which such claims of title are so made and resisted.

But a suit by some of the co-sharers in a joint and undivided mahal for such declaration and such recovery of a proportionate share of rent as above referred to is barred by the provisions of s. 106 of the North-Western Provinces Rent Act, in the absence of proof of local custom or special contract authorising such suits.

THE plaintiffs in this case formed one of three sets of co-sharers of a village, and they instituted a suit against one of the tenants, alleging that although the village was held in joint and undivided shares, each co-sharer of the *taluka* collected rents from the tenants to the extent of his share. The suit was instituted under the N.-W. P. Rent Act (XII of 1881) in the Revenue Court, and the tenant defendant in that case pleaded payment of the full amount of rent

\* Second Appeal No. 1950 of 1886 from a decree of G. J. Nicholls, Esq., District Judge of Ghanpur, dated the 2nd August 1886, confirming a decree of Maulvi Inam-ul-Haqq, Munsif of Ballia, dated the 24th December 1885.

to another set of co-sharers in the *taluka*, and thereupon those co-sharers were impleaded as defendants, and pleaded that they were entitled to collect the entire rent from the tenant against whom that suit was instituted. That suit was dismissed by the Rent Court upon the ground that the *mahal* being joint and undivided, the plaintiffs were not entitled to sue for settlement of account against their co-sharers.

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The plaintiffs, dealing with the Rent Court's decision as one under the latter part of s. 148 of the North-Western Provinces Rent Act, instituted this suit in the Civil Court under the proviso to that section, with the object of obtaining a declaration of their title to receive one-third of the rent payable by the tenant, and for recovery of certain sums of money alleged to be their share of the rent paid by the tenant to the other co-sharers, the first set of defendants.

The suit was resisted upon various minor pleas, but the main pleas urged in defence were that such a suit was not maintainable, as the decision of the Rent Court was not such as s. 148 contemplated, and that the plaintiffs had no right to receive any share of the rent from the tenant in question.

The Court of first instance (Munsif of Ballia) dismissed the suit, holding that the Rent Court's decision was based on s. 106 of the North-Western Provinces Rent Act, prohibiting separate rent suits by co-sharers for their respective shares of rent; that the decision was not of the nature contemplated by s. 148 of the Act; and that the Civil Court therefore had no jurisdiction to entertain the suit. The Munsif further held that "no attempt has been made and no evidence has been adduced to prove the existence of" any local custom or special custom authorising the maintenance of such a suit in this particular case.

On appeal, the District Judge of Ghazipur affirmed the Munsif's decree. Upon the question of local custom, he observed :—"Custom was not set up in the Revenue Court. There is no sufficient proof of the alleged harassing and destructive custom, and partial

1888 admissions of some of the respondents, if embodied in the *wajib-ul-ars*, would not convince me that such monstrous custom prevailed.”  
**MAHADEO SINGH** The plaintiffs instituted a second appeal from the decrees of the  
**v.** Munsif and the District Judge.  
**BACHU SINGH.** Munshi *Juala Prasad*, for the appellants.

The Hon. *T. Conlan* and Mr. *J. E. Howard*, for the respondents.

**MAHMOOD, J.** (after stating the facts, continued):—Upon appeal by the plaintiffs to the lower appellate Court, the learned Judge of that Court, whilst concurring in the general conclusions of the first Court, has recorded some observations which go beyond the exigencies of the case and with which I am not concerned here. The only point which has been urged before me in second appeal on behalf of the plaintiffs-appellants is that the Courts below have erred in law in holding that the suit did not lie, and that they should have decided it on the merits.

I do not think it is necessary for me to decide whether the Rent Court's decision in this case dismissing the plaintiffs' suit for rent was an adjudication such as s. 148 of the Rent Act contemplates, because, whether it was so or not, a decision under that section is not in my opinion an essential condition precedent to the maintainability of a declaratory suit in the Civil Court, for such matters are dealt with under s. 42 of the Specific Relief Act (I of 1877). The effect and intention of the proviso to s. 148 of the Rent Act seems to be to preserve the Civil Court's jurisdiction, while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as the section contemplates. But neither the section nor the proviso aims at laying down any rules governing questions of the jurisdiction of the Civil Court in connection with declaratory suits. The suit therefore, so far as it sought a declaration of the plaintiffs' right to collect their one-third share of rents, was maintainable as a suit of civil nature, and there was no want of jurisdiction in its strict sense. Nor do I think that the suit, so far as it sought to recover certain sums of money as the plaintiffs' share of the rent alleged to have been wrongfully realized by their

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co-sharers, the first set of defendants, fell beyond the jurisdiction of the Civil Court. To oust such jurisdiction, the provisions of s. 11 of the Civil Procedure Code require the existence of a legislative enactment. In the present case all that has been suggested is that the claim for money, being between two co-sharers, partook of the nature of a suit such as that contemplated by cl. (h) of s. 93 of the Rent Act, and that it was therefore not cognizable by the Civil Court. But in the present case the right of the plaintiffs to receive any portion of the rents claimed is denied by their co-sharers, the defendants, and the form of the suit itself seeks establishment of title, and consequent recovery of such portions of the rents as the plaintiffs allege themselves entitled to by virtue of their disputed right. In my opinion cl. (h) of s. 93 of the Rent Act does not contemplate suits in which such claims of title are made and resisted upon denial of the plaintiffs' right.

For these reasons I am of opinion that both the Courts below were wrong in holding that the Civil Court had no jurisdiction to entertain the suit.

But this view of the preliminary points in the case does not go far to help the plaintiffs-appellants, for their case is bad on the merits. The relief they pray for both in point of declaration of title and recovery of money cannot be granted to them unless they show that such relief can be granted in accordance with the law.

Now, in the first place, it has been found by the Courts below as a matter of fact that the *mahal* of which the plaintiffs are co-sharers is joint undivided property within the meaning of s. 106 of the Rent Act, which lays down that :—

“No co-sharer in an undivided property shall, in that character, be entitled separately to sue a tenant under this Act, unless he is authorised to receive from such tenant the whole of the rent payable by such tenant; but nothing in this section shall affect any local custom or any special contract.”

The rent-law of these Provinces is therefore clearly opposed to the declaration which the plaintiffs seek, namely, that they are



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entitled to recover from each tenant of the *mahal* their proportionate share of rent, leaving the remainder to be collected by the other co-sharers in proportion to their respective shares in the *mahal*. The section says that such is not to be the case, unless local custom or special contract is established. Now in the present case the Court of first instance observes:—"No attempt has been made and no evidence has been adduced to prove the existence of any such custom in this case," and the lower appellate Court has used even more emphatic language. The learned Judge of that Court observed:—

"Custom was not set up in the Revenue Court. There is no sufficient proof of the alleged harassing and destructive custom, and partial admissions of some of the respondents if embodied in the *wajib-ul-arz* would not convince me that such monstrous custom prevailed."

Sitting here as a Judge of second appeal I must accept these concurrent findings of fact, and must hold that the plaintiffs have failed to prove any such custom as would entitle them to the declaration that they have a right to realize or claim only their proportionate share of rent from tenants in the *mahal* in opposition to the general rule of the rent-law of these Provinces enunciated in s. 106 of the Rent Act. It follows that neither the declaration nor the money which they claim in this suit as the consequence of such declaration can be awarded to the plaintiffs-appellants.

For these reasons the grounds urged in appeal cannot prevail and I dismiss the appeal with costs.

*Appeal dismissed.*

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 November 12.

*Before Mr. Justice Mahmood.*

MUHAMMAD SULAIMAN (JUDGMENT-DEBTOR) v. JHUKKI LAL  
 (DECREE-HOLDER).\*

*Execution of decree—Compromise—Estoppel—Civil Procedure Code, ss. 257 A, 375, 647.*

Although a Court executing a decree is bound by the terms thereof, and cannot add to or vary or go behind them, the effect of s. 375 read with s. 647 of the Civil Procedure

\*Second Appeal No. 1408 of 1887 from a decree of R. G. Hardy, Esq., Deputy Commissioner of Jhansi, dated the 12th July, 1887, confirming a decree of Pandit Gopal Rao, Deputy Collector of Jhansi, dated the 30th May, 1887.

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Code is that, when a decree is put into execution, the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit. Such a compromise does not extinguish the decree; and the Court executing the decree is bound, subject to the conditions indicated by s. 375, to give effect to the compromise. In execution proceedings the word "suit" in s. 375 must, with reference to s. 647, be read as meaning "execution of decree." By reason of the words in s. 375, "lawful agreement or compromise," the provisions of s. 257A become applicable to such a case; and, so long as the requirements of that section are satisfied, the compromise becomes a part of the decree itself, and—at least as between the decree-holder and the judgment-debtor—can be given effect to in execution of the decree.

When such a compromise has been duly made and sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can renege from the position assumed by them in the matter of the compromise.

Even if such a compromise has been irregularly sanctioned by the Court executing the decree—the irregularity not amounting to want of jurisdiction—the compromise must take effect until the order sanctioning it is set aside, and, until that happens, the parties are bound by it in all proceedings relating to the execution of the decree, and, where they have acted upon it, they are estopped thereafter from questioning its validity.

*Sita Ram v. Dasrath Das* (1) followed, *Debi Rai v. Gokal Prasad* (2), *Ram Lakhan Rai v. Bakhtaur Rai* (3), *Fateh Muhammad v. Gopal Das* (4), *Ganga v. Murlidhar* (5), *Sheo Golam Lal v. Beni Prasad* (6), *Lakshmana v. Sukiya Bai* (7), *Yella Chetti v. Munisami Reddi* (8), *Pisani v. Attorney-General of Gibraltar* (9), and *Sadasiva Pillai v. Ramalinga Pillai* (10) referred to.

THE facts of this case are stated in the judgment of the Court.

Mr. *Abdool Majid* for the appellant.

Pandit *Sundar Lal* and Munshi *Madho Prasad*, for the respondent.

MAHMOOD, J.—The decree-holder-respondent obtained a simple money-decree against the judgment-debtor-appellant on the 24th March, 1884, and applied for execution thereof on the next day and obtained attachment of the judgment-debtor's property. Thereupon the judgment-debtor's brother, Muhammad Ibrahim, made an application on the 14th June, 1884, stating that an agreement had

(1) I. L. R., 5 All. 492.

(2) I. L. R., 3 All. 585.

(3) I. L. R., 6 All. 628.

(4) I. L. R., 7 All. 424.

(5) I. L. R., 4 All. 240.

(6) I. L. R., 5 Calc. 27.

(7) I. L. R., 7 Mad. 400.

(8) I. L. R., 6 Mad. 101.

(9) L. R., 5 P. C. 516.

(10) L. R., 2 I. L. 219.

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been arrived at to the effect that Rs. 200 cash was to be paid to the decree-holder and the balance was to be paid by instalments of Rs. 100 *per annum*, failing which execution was to be taken out against the judgment-debtor and then from his brother, the applicant. The decree-holder-respondent appears to have accepted this arrangement, and on the 4th July, 1884, the Court passed an order sanctioning the agreement and directing that the execution of decree in future should take place according to the terms of the agreement against the original judgment-debtor and his surety Muhammad Ibrahim. The order further directed the attached property to be released and, to use the words of the lower appellate Court, "the signature of the judgment-debtor is appended beneath the order."

The present litigation began with an application made by the decree-holder on the 28th April, 1887, for execution of the decree against the original judgment-debtor and the surety. The original judgment-debtor resisted the execution upon the ground that since Muhammad Ibrahim had stood surety for him, the decree could not be executed, and the Court of first instance dealing with the objection held that "the decrees should likewise be executed against Muhammad Sulaiman, and on failure to recover the money from him, the decree-holder might then institute a fresh suit against Muhammad Ibrahim, for he cannot recover the money from him by taking out execution of the present decree."

The effect of the first Court's order was to allow execution against the original judgment-debtor, Muhammad Sulaiman, appellant, and to disallow it against the surety, Muhammad Ibrahim.

Upon appeal by the judgment-debtor, Muhammad Sulaiman, the learned Judge of the lower appellate Court has held that "even if a fresh contract was entered into, the judgment-debtor is estopped, inasmuch as he has acted on the contract by fulfilling some of its conditions, namely, paying Rs. 200 cash and one at all events of the subsequent instalments. He cannot, therefore, repudiate the condition now being enforced against him, namely, the execution of decree against himself on account of the non-payment of the instalments."

Upon these grounds the learned Judge upheld the order of the first Court.

This second appeal has been preferred by the judgment-debtor, Muhammad Sulaiman, and the only ground urged is that the agreement of the 14th June 1884 and the order of the 14th July 1884, extinguished the decree, and that the only remedy now available to the decree-holder-respondent lies in a regular suit against the surety who undertook liability under the compromise, or rather the arrangement above mentioned.

In support of this contention Mr. *Abdul Majid* has relied upon a Full Bench ruling of this Court in *Debi Rai v. Gokal Prasad* (1), which was followed in *Ram Lakhan Rai v. Bakhtawar* (2) and *Fateh Muhammad v. Gopal Dass* (3). On the other hand, Pandit *Sundar Lal* for the respondent in opposing the contention cites a later Full Bench ruling of this Court in *Sita Ram v. Dasrath Das* (4) which appears to have been decided without any reference to the earlier Full Bench ruling. Again, I am referred to the case of *Ganga v. Murli-dhar* (5) in which the learned Judges distinguished the case from the Full Bench ruling in *Debi Rai v. Gokal Prasad* (1) and also to a ruling of the Calcutta High Court in *Sheo Golam Lal v. Beni Prasad* (6) and a ruling of the Madras High Court in *Lakshmana v. Sukiya Bai* (7).

Upon the strength of these various rulings, the case has been argued before me at considerable length on both sides, and much has been said as to whether or not the two Full Bench rulings of this Court above mentioned are in conflict with each other, and it has been contended that the later Full Bench ruling in *Sita Ram v. Dasrath Das* (4) intended to overrule the earlier Full Bench ruling in *Debi Rai v. Gokal Prasad* (1) and to adopt the dissentient opinion of Oldfield, J., in the latter case, although nothing to this effect appears in the judgment of the later Full Bench. As to this part of this argument I need only say that sitting here as single Judge, I am bound by the Full Bench rulings of this Court, and whether or

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(1) I. L. R., 3 All. 385.

(4) I. L. R., 5 All. 492.

(2) I. L. R., 6 All. 623.

(5) I. L. R., 4 All. 240.

(3) I. L. R., 7 All. 424.

(6) I. L. R., 5 Calc. 27.

(7) I. L. R., 7 Mad. 400.

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not there is conflict between any two of them, I am bound by the rule laid down in the later ruling. Nor is it necessary for me to enter into an elaborate disquisition as to the reconcilableness or otherwise of the principles upon which these various rulings proceed. I think it is enough, for the purposes of this case, to say that the point of law which requires determination is of a simple character and need not be complicated with the *ratio decidendi* of the various rulings which have been cited.

I hold it to be a correct proposition of law that a Court executing a decree is bound by the terms of that decree and cannot go behind them. It is equally true as a general proposition that such Court can neither add to such a decree nor vary its terms. But it is also true that when a decree is put into execution, the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit. This I take to be the effect of s. 375 of the Code of Civil Procedure read with s. 647 of that enactment, and this view is fortified by the principle upon which my brother Straight and myself decided the case of *Sarju Prasad v. Sita Ram* (1).

Now, when in execution proceedings any arrangement amounting to a compromise has been arrived at between the decree-holder and the judgment-debtor, the Court executing the decree is bound to give effect to such compromise, subject of course to the limitations indicated by s. 375 of the Code, in which the word *suit* must in execution proceedings be read to mean "*execution of decree*," that is, *mutatis mutandis*, which s. 647 of the Code implies. Further, because such a compromise must be according to law or as s. 375 terms it, *a lawful agreement or compromise*, the provisions of s. 257A become applicable, and, so long as these requirements are satisfied, the compromise becomes a part of the decree itself and can be given effect to in execution of such a decree, at least as between the decree-holder and the judgment-debtor, as was held by the Madras Court in *Yella Chetti v. Mumsami Reddi* (2). I hold further that when such a compromise has been duly arrived at and

(1) I. L. R., 10 All. 71. (2) I. L. R., 6 Mad. 101.

sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can refile from the position which they thus deliberately took up in the matter of the compromise. I go even further, and hold that, even if such a compromise is irregularly sanctioned by the Court executing the decree—the irregularity not amounting to want of jurisdiction—the compromise must take effect unless the order sanctioning it is set aside by the procedure required by the law for such a purpose. But so long as the order sanctioning the compromise stands, the parties are bound by it in all proceedings relating to the execution of the decree, and where they have acted upon the compromise they are estopped thereafter from questioning its validity.

The general principle upon which this view proceeds was laid down by the Lords of the Privy Council in *Pisani v. Attorney-General of Gibraltar* (1) which was applied by their Lordships to Indian cases in *Sadasiva Pillai v. Ramalinga Pillai* (2) which, indeed, is the leading case upon the subject, and applicable in principle to the case now before me. This appears from the observations made by Oldfield, J., in his dissentient judgment in the earlier Full Bench ruling of this Court in *Debi Rai v. Gokal Prasad* (3) and is consistent with the conclusion at which the later ruling of the Full Bench in *Sita Ram v. Dasrath Das* (4) arrived, as also with the Division Bench ruling of this Court in *Ganga v. Murkidhar* (5). It is enough for me to say that I am bound by the Privy Council rulings, and that, for the purposes of this case, I am content with the conclusions at which the two rulings of this Court last cited arrived.

Now, in the present case, the arrangement was contained in the application of the judgment-debtor's brother Muhammad Ibrahim, dated the 14th June, 1884. That arrangement was to the effect that, "should Muhammad Sulaiman fail to pay the amount of the decree, then it may be recovered from Muhammad Ibrahim." The order of the Court, dated the 4th July, 1884, shows that this arrangement was accepted by the decree-holder-respondent and by

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(1) L. R., 5 P. C. 516.

(3) I. L. R., 3 All. 385.

(2) L. R., 2 I. A. 219.

(4) I. L. R., 5 All. 492.

(5) I. L. R., 4 All. 240.

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the judgment-debtor-appellant; that it was sanctioned by the Court; and that it was in consequence of such compromise that the judgment-debtor's property was released from attachment. It has been found further by the lower appellate Court that this compromise was acted upon "by paying Rs. 200 cash and one, at all events, of the subsequent instalments." There is nothing in that compromise to show that it was intended either to extinguish the decree, or to create any relation other than that of a decree-holder and judgment-debtor between the parties to this appeal. The decree therefore subsists as against the judgment-debtor-appellant, though, as I have already explained, its execution has been modified by the compromise above-mentioned. It is, indeed, in accordance with the terms of that compromise that the decree-holder-respondent has prayed for execution of his decree, and the Courts below have allowed that execution.

I hold that under such circumstances the order of the Courts below is correct, for the decree still subsists and is enforceable against the judgment-debtor-appellant according to the above-mentioned compromise.

For these reasons I dismiss the appeal with costs.

*Appeal dismissed.*

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*Before Mr. Justice Straight and Mr. Justice Mahmood.*

CHEDI LAL AND OTHERS (DEFENDANTS) v. BHAGWAN DAS AND OTHERS  
 (PLAINTIFFS).\*

*Mortgage—Decree enforcing hypothecation—Satisfaction of decree by person not subject to legal obligation thereunder—Suit for contribution brought by such person against judgment-debtors—Gratuitous payment—Act IX of 1872 (Contract Act), ss. 69, 70—"Lawfully."*

The widow of *D*, a separated Hindu, hypothecated certain immoveable property which had belonged to her husband. The immediate reversioners to *D*'s estate were his nephew *S* and the three sons of his brother *O*. After the widow's death, the mortgagee put his bond in suit, impleading as defendants *S*, two of *S*'s four sons and the three sons of *O*. Only the three last-mentioned persons resisted the suit: and

\* Second Appeal No. 1118 of 1886 from a decree of W. R. Barry, Esq., District Judge of Ghazipur, dated the 5th April, 1886, reversing a decree of Pandit Ratan Lal, Subordinate Judge of Ghazipur, dated the 12th September, 1885.

the mortgagee obtained a decree directing the sale of the mortgaged property in satisfaction of his claim. From the operation of this decree *S* was wholly exempted, and his sons were made liable only to pay their own costs. Before any sale in execution of the decree could take place, the sons of *S* paid the amount of the decree into Court, thus saving the property from sale. They subsequently sued the sons of *O* for contribution in respect of this payment. It was found that, at the time when the payment was made, *S* was a member of a joint Hindu family with the defendants, and that his sons, the plaintiff, had, at that time, no interest in the property by transfer from him.

*Held* that at the time of the payment the plaintiffs could not properly be regarded as in the position of co-mortgagors with the defendants, so as to have an equitable lien upon the property they had saved from sale; that it was not a case of a payment which the defendants were bound to make in which the plaintiffs were "interested" within the meaning of s. 69 of the Contract Act; and that therefore the fiction of an implied request by the defendants to the plaintiff to make the payment could not be imported into the case, and the plaintiffs were not entitled to contribution.

*Held* also that there was no such relationship between the parties as would create or justify the inference of any right in the plaintiffs to look to the defendants for compensation, so as to make s. 70 of the Contract Act applicable; and that if the plaintiffs, as mere volunteers, chose to pay the money not for the defendants but for themselves, they could not claim the benefits of that section.

The principle of the decision in *Pancham Singh v. Ali Ahmad* (1) has been recognized and provided for in the Transfer of Property Act.

By the use of the word "lawfully" in s. 70 of the Contract Act, the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify the inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. *Ram Tuhul Singh v. Bisswar Lal Sahoo* (2) referred to.

THE facts of this case are stated in the judgments of the Court.

Mr. *Amiruddin*, for the appellants.

Mr. *Simeon*, for the respondents.

STRAIGHT, J.—This is a second appeal from a decree of the Judge of Ghazipur, dated the 5th April 1886. The suit out of which it has arisen was brought by the plaintiffs-respondents in the Court of the Subordinate Judge of Ghazipur against the three defendants-appellants before us, and one Hira Lal, who is not an

(1) I. L. R., 4 All. 58. (2) L. R. 2 I. A. 131.

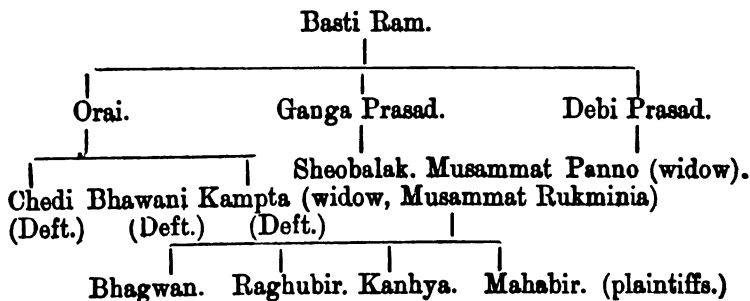
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appellant in this Court. The claim set up by the plaintiffs was presented under the following circumstances, and in order better to understand the facts, it will be convenient here to give a genealogical tree of the family in which the plaintiffs and the three defendants before us were members :—



From the above tree it will be seen that upon the death of Debi Prasad, who left no children behind him, he admittedly being a separated Hindu brother, his widow, Musammat Panno, was entitled to life-possession of the property left by him, and upon her decease on the 12th October, 1879, it is admitted that the immediate reversioners thereto were the present defendants-appellants, the three sons of Orai, and Sheobalak, the son of Ganga Prasad, and the father of the plaintiffs in the present suit. It seems that prior to her death, Musammat Panno, along with Musammat Rukminia, the mother of the plaintiffs, on the 17th September, 1877, executed a hypothecation bond in favour of one Mahabir, in respect of an advance of money made, and as security for that advance had hypothecated a portion of the immoveable property of which she was in life-possession as the widow of Debi Prasad. After the death of Musammat Panno, Mahabir put his hypothecation bond in suit, and he impleaded in that litigation, as I understand it, the three present defendants-appellants, Sheobalak, the father of the three plaintiffs, and Bhagwan and Kanhya, either directly, or some of these persons were brought upon the record as defendants at their own instance. In the result a decree was passed in favour of Mahabir. The three defendants-appellants before us were exempted in person

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from the execution of the decree, but cast in costs. The defendant Sheobalak was exempted altogether, and as regards the two plaintiffs Bhagwan and Kanhya, it is not very clear what took place with regard to them. But I think this, at least, is certain, that they were in no way made liable under that decree. The effect of that decree was that the property which had been hypothecated by Musammat Panno was in the ordinary course of things advertised for sale: and the position, looking to the genealogical tree of the parties, at that time was *prima facie* that, on the one hand, Mahabir was the mortgagee entitled under a decree of Court to enforce his mortgage, while, on the other hand, the three appellants and Sheobalak were the reversioners of the mortgagor rights against whom the decree might be enforced to the extent that the mortgaged property could be sold *in invitum* to them, unless they paid up the amount. At that time, so I understand the facts to be, Bhagwan and Kanhya and the other plaintiffs in the present suit were minors, and upon the 14th March, 1881, on behalf of Bhagwan and Kanhya a sum of Rs. 808-12-6 was paid into the Court executing Mahabir's decree for the purpose of stopping the sale of the mortgaged property, and the mortgage was thereby paid off, the decree was satisfied and the property saved from execution-sale.

On the 17th July, 1881, the defendants Chedi and his brother sold to Hira Lal, the other defendant, the  $2\frac{1}{2}$  annas share that they had inherited from Musammat Panno in the property mortgaged to Mahabir, and it is in this way that Hira Lal, the original second defendant in the suit, was introduced into the litigation. He, however, is not before us, and no question arises in this appeal for us to determine in respect of him how and under what circumstances he acquired the property from the first set of defendants, or whether any special protection can be afforded to him as a purchaser without notice.

The present suit which was instituted on the 9th May, 1885, by Bhagwan and Kanhya and their other two brothers under the guardianship of their mother, claims a sum of Rs. 404-6-3, the half of Rs. 808-12-6 paid into Court on the 14th March, 1881, with a

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sum of Rs. 242-6-0 interest, in all Rs. 646-12-3, principal and interest, as a contribution from the defendants towards the amount which the plaintiffs say that they were constrained to pay in order to save the whole property from sale and in which payment they say the defendants-appellants were jointly interested.

But that is not all the plaintiffs ask. They ask further to enforce the claim for the amount of money by the sale of the 2 annas 8 pies share of the two mauzas mortgaged to Mahabir Rai which came to the hands of the defendants upon the death of Musammat Panno, upon the allegation that upon equitable principles, *ex aequo et bono*, they, having discharged the whole of the obligation in respect of the whole property and so saved it from sale, have an equitable charge or lien upon the property in the hands of the defendants for the amount of money that they were compelled to pay in order to stop the execution of the decree.

Without going into all the defences that were set up by the defendants to this suit, it is enough to say, I think, for the purposes of this appeal, that it was resisted by them upon the ground that at the date of the payment of the Rs. 808-12-6 on the 14th March, 1881, Sheobalak, the father of the plaintiff, then being alive, they had no interest in the property, and therefore their payment of the money must be regarded as a gratuitous and voluntary payment, which they are not entitled to recover from the defendants.

The Subordinate Judge who tried this case as a Court of first instance came to the conclusion that this defence was satisfactorily established; and he accordingly dismissed the suit. The learned Judge before whom the case came in appeal, at the instance of the plaintiffs, has taken a different view, and in one portion of his judgment he makes use of the following remarks. He says:—"It is sufficient to remark that Sheobalak was the person who succeeded to the share by inheritance, but he seems to have voluntarily made over his share to his son." Now, as far as I have been able to ascertain from the learned pleaders, it is not very easy to understand precisely what the meaning of the learned Judge here is. I do not know where the learned Judge finds any warrant in the evidence

for this inference as to a relinquishment by Sheobalak in favour of his sons, though the statement contained in the first plea taken below, that at the time the execution-sale was threatened, the plaintiffs-appellants were recorded in the revenue records as proprietors of half the property mortgaged to Mahabir Rai, a fact which does not appear to be disputed, seems to favour the Judge's view. My brother Mahmood having fully considered this case since the last hearing, desires to have further information, mainly upon matters directed to this point, and is desirous that there should be two or three issues remanded for the purpose of clearing up the questions thus involved in our proper determination of this appeal. Naturally I should not in the least degree wish, in a case of this description, to prevent further inquiry by the lower appellate Court, which is the proper tribunal for the determination of matters of fact.

At the present I am not prepared to say that it is quite clear that the plaintiffs were not interested in the property sufficiently to entitle them to call into their aid the rule laid down in s. 69 of the Indian Contract Act. Whether, assuming that section or s. 70 to be applicable to their position, the further step can be taken of holding that by their payment they acquired a lien on the share of the defendants saved by such payment, is a matter that requires very full and careful consideration, and need not be discussed or determined until we have received a return to the issues which my brother Mahmood proposes, which I had an opportunity of seeing, and which he will state in the observations he has to make in remanding issues to the lower appellate Court for its consideration and finding.

Having stated the facts in order that when the case comes back we may have them clearly before us, I entirely concur in the order of remand proposed by my brother Mahmood.

MAHMOOD, J.—My learned brother Straight has stated the facts of the case, and, of course, it would be waste of time for me to repeat them. I only wish to add that without expressing any definite opinion as to the extent or nature of the liability which at least two of the plaintiffs were under, in consequence of the decree of the

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30th June, and without expressing any opinion as to the question whether the action of the plaintiffs in paying up the whole of that decree on the 14th March, 1881, did not entitle them to maintain a suit such as the present, either for recovery of possession of what they allege was done by them for the benefit of the defendants, and which benefit has been enjoyed by those defendants; and also without saying anything definite as to whether or not such payment of the 14th March, 1881, did entitle the plaintiffs to claim the money due as such compensation by enforcement of a sort of charge on immoveable property, I feel I should not dispose of the case finally upon a purely hypothetical state of facts. The learned Judge of the lower appellate Court in reversing the decree of the Court of first instance, has taken a view of the law as to the accuracy of which I feel myself unable to pass finally any decision without specific information upon the following points of fact. Those points of fact are possibly ascertainable from the record, but we sitting here as Judges of second appeal are not intended by the Legislature to discharge those functions. Therefore my view is that before passing any judgment upon the legal points raised in the case, which Mr. *Amiruddin* has with so much ability pressed upon us, we should have definite findings on the following issues:—

1. Did the plaintiff on the 14th March, 1881, own any interest in the property left by the deceased Musammat Panno, either by gift or other transfer from Sheobalak or otherwise?
2. Was Sheobalak on the 14th March, 1881, a member of a joint Hindu family with the present plaintiffs?
3. When did Sheobalak die?
4. Were the plaintiffs or any of them judgment-debtors of the decree of the 30th June, 1881, whether jointly with the defendants or otherwise?

For distinct findings upon these issues, I would remand the case, as I have the approval of my brother Straight, to the lower appellate Court and upon receipt of the findings ten days will be allowed for objections under s. 567 of the Code.

[On the return of findings upon the issues remanded, the case again came for hearing before Straight and Mahmood, JJ. The parties were represented as before.]

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STRAIGHT, J.—It is not necessary that I should enter at length into the circumstances of this case, as they were very fully stated by me in my former judgment of the 28th October, 1887. The effect of my then order was that, having regard to certain matters which in the opinion of my brother Mahmood were doubtful or unascertained, I assented to certain issues being settled by him for determination by the lower appellate Court, and that Court has now recorded its findings upon those issues. It is as to these issues and in reference to those findings that it now becomes my duty finally to deal with this appeal and to dispose of it.

In reference to the questions remanded it has now been determined by the learned Judge that upon the 14th March, 1881, the date of the alleged payment in respect of the decree of Mahabir Prasad, dated the 30th January, 1880, the two plaintiffs had no interest in the property left by Musammat Panno, either by gift or other transfer from Sheobalak. It has further been found that upon the 14th March, 1881, Sheobalak and the plaintiffs, his sons, were members of a joint and undivided Hindu family; that Sheobalak died in 1882, and, what is most material in looking at this case in one of its legal aspects, that the present plaintiffs were not judgment-debtors under the decree of Mahabir Prasad, dated the 13th June, 1880, along with the present defendants. It is in reference to those findings that it becomes my duty to consider whether the original judgment of the learned Judge passed in appeal can be sustained either on the footing that the facts found bring the case within the provision of s. 69 of the Contract Act or within the principle of s. 70 of the same statute. Much of the learned Judge's judgment proceeded upon the construction to be attached to certain provisions of the Transfer of Property Act, and he also referred to a judgment of my own (1). That ruling, however, has now become more or less obsolete by reason of the circumstance that the principle enun-

(1) *Pancham Singh v. Ali Ahmad*, I. L. R., 4 All. 58.

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ciated in it has been recognized in the Transfer of Property Act, and provided for the rein. The applicability of that principle to the present case turns upon this: can it rightly or properly be said that upon the 14th March, 1881, when the 800 and odd rupees were paid by the plaintiffs, they could properly be regarded as mortgagors in the sense that they stood in the shoes of Musammatt Panno, and were mortgagors along with the defendants and paid that money as one party of mortgagors for themselves and other mortgagors in such a way as to create an equitable lien upon the property they had saved from sale, which represented the shares of such mortgagors? I may say that the learned Judge's decision rather begs this question, because if it be conceded that these present plaintiffs were mortgagors, much of the difficulty in their way would disappear. But the *cruz* of Mr. Amiruddin's contention is that they never were mortgagors and never stood in the shoes of the mortgagors at the time of the payment. The state of things then stands thus: that the decree which was obtained by Mahabir Prasad was not a decree under or in respect of which any legal obligation or liability rested upon these present plaintiffs, except in so far as they were called upon to pay their own costs in the Court below, and that no other legal liability or obligation was imposed by that decree upon them. It is true that as regards these present defendants there was a legal liability or obligation, but for the purpose of applying the provisions of s. 69 of the Contract Act, it is essential that there should be first a person who is bound by law to make a certain payment, secondly, another person who is interested in such payment being made, and thirdly a payment by such last mentioned person. In this particular case, as far as I am able to gather from the findings, there was no payment of money which the defendants were bound by law to make in which it can be said that these plaintiffs were *interested*. Consequently, the fiction of an implied request from the defendants to the plaintiffs to make the payment cannot be properly imported into the case so as to bring it under s. 69 of the Contract Act, and the right to reimbursement was not created.

Then arises the question whether s. 70 is applicable or not to the facts of the present case. I pointed out to Mr. Simeon that if you

could read s. 70 of the Contract Act without the word "lawful" in it, I might go to the full length of the contention set up by him. But I presume that the Legislature intended something when it used the word "lawful," and that it had in contemplation cases in which a person held such a relation to another as either directly to create or by implication reasonably to justify an inference that by some act done for another person the party doing the act was entitled to look for compensation for it to the person for whom it was done. Here there was in my opinion no such relation between the parties as would create any such right or from which it could be reasonably inferred. If the plaintiffs, as mere volunteers, chose to put their hands into their pockets and to pay a sum of money not for the defendants but for themselves, that was their own look-out and they cannot now claim the benefits of s. 70. It will be convenient in this connection to refer to what their Lordships of the Privy Council have said in the case of *Ram Tuhul Singh v. Bissessar Lall Sahoo* (1).

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"It is not in every case in which a man has benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation express or implied to repay. It is well settled that there is no such obligation in the case of a voluntary payment by *A* of *B*'s debt. Still less will the action lie when the money has been paid as here, against the will of the party for whose use it is supposed to have been paid: *Stokes v. Lewis* (2). Nor can the case of *A* be better because he made the payment not *ex mero motu*, but in the course of a transaction which in one event would have turned out highly profitable to himself and extremely detrimental to the person whose debts the money went to pay."

Having dealt with those two points above stated, the appeal is disposed of. I think that the first Court was right in dismissing the claim of the plaintiffs, and that the learned Judge was wrong in the view that he took of the law applicable to the facts of this case.

(1) L. R., 2 I. A. 181.

(2) 1 Term Rep. 20.



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In my opinion the plaintiffs had no legal right upon which to come into Court and claim recoupment or contribution to the extent of one-half the amount paid. I think the appeal should be decreed; that the judgment of the learned Judges should be set aside and that of the first Court restored. The defendants-appellants are entitled to their costs in all Courts.

MAHMOOD, J.—My opinion in this case coincides entirely with the views to which my learned brother has given expression. I need only add that any other view of the law would amount to saying that the effect of s. 70 of the Contract Act is to enable a total stranger, without any express or implied request on behalf of a debtor, to put himself into the shoes of the creditor by the simple fact of paying the debts due by such debtor. I do not think that the section could have been intended to involve such results.

*Appeal allowed.*

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*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

SHIB LAL (DEFENDANT) v. BHAGWAN DAS (PLAINTIFF).\*

*Vendor and purchaser—Part payment of purchase-money—Execution, registration and delivery of sale-deed—Completion of sale—Right of purchaser to sue for possession—Act IV of 1882 (Transfer of Property Act), s. 54.*

Non-payment of the purchase-money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser: and the latter, notwithstanding such non-payment, can maintain a suit for possession of the property subject to such equities, restrictions or conditions as the nature of the case may require. *Mohun Singh v. Shib Koonwer* (1), *Goor Parshad v. Nunda Singh* (2), *Heera Singh v. Ragho Nath Sakai* (3), and *Umedmal Motiram v. Dava* (4) referred to.

The difference between an executed contract of sale and an executory contract to sell observed on. *Ikkal Begam v. Gobind Prasad* (5) dissented from.

A deed of sale of immoveable property having been duly executed and registered and delivered, and the purchaser having paid a portion of the purchase-money to the vendor's creditors—*held*, with reference to s. 54 of the Transfer of Property

\* Second Appeal No. 630 of 1887 from a decree of C. W. P. Watts, Esq., District Judge of Moradabad, dated the 22nd December, 1886, confirming a decree of Maulvi Zain-ul-abdin Khan, Subordinate Judge of Moradabad, dated the 31st August, 1886.

(1) N.-W. P. H. C. Rep. 1866, p. 85. (3) N.-W. P. H. C. Rep. 1866, p. 30.  
(2) N.-W. P. H. C. Rep. 1866, p. 160. (4) I. L. R. 2 Bom. 547.  
(5) I. L. R. 3 AH. 77.

Act (IV of 1882) that these facts amounted to a full transfer of ownership, and the purchaser could maintain a suit for possession of the property sold, notwithstanding that he had not paid the balance of the purchase-money to the vendor or to a mortgagee of the property, as stipulated in the deed.

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THE facts of this case are stated in the judgment of Mahmood, J

Pandit *Ratan Chand* and Babu *Jogindro Nath Chaudhri* for the appellant.

Kunwar *Shivanath Sinha* and Mr. *Khushwakht Rai* for the respondent.

MAHMOOD, J.—In order to explain the points of law which arise in this case, it is necessary to recapitulate the facts and the findings at which the lower Courts have concurrently arrived.

The defendant Sri Ram was the owner of a ten-biswas share in the village, and he executed a usufructuary mortgage thereof in favour of one Chajmal Das on the 1st June 1861, and placed the mortgagee in possession. It has also been found that the aforesaid Sri Ram borrowed further sums of money from Chajmal Das and hypothecated the above-mentioned property as security for repayment of the loan. These sums are stated in the first Court's judgment to have amounted to about Rs. 2,338, but apparently this sum is not the result of any regular calculation, as no mortgage-account appears to have been taken, Chajmal Das being no party to this litigation.

The Courts below have also concurred in finding that the defendant Sri Ram owed Rs. 406 to one Hargo Lal on a bond dated the 10th June 1884, and Rs. 900 to one Dalip Singh.

On the the 3rd July 1884, Sri Ram executed a registered sale-deed, whereby he conveyed the above-mentioned ten biswas to Bhagwan Das, plaintiff-respondent, in lieu of Rs. 4,800. The sale-deed specifies these sums to be paid in the following manner :—

- (1) Rs. 406 to be paid to Hargo Lal.
- (2) Rs. 900       "       Dalip Singh.
- (3) Rs. 622       "       Chajmal Das, on his mortgage of 1st June 1861.

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(4) Rs. 2,872, being the balance to be paid in cash to the vendor Sri Ram, defendant, thus making up the total sum of Rs. 4,800 purchase-money.

It will be observed that the above-mentioned items take no account of the hypothecation charge of Chajmal Das on the property sold, and this circumstance appears to be the main cause of the present litigation.

On the 8th July 1884 Sri Ram executed another sale-deed of the same property in favour of the defendant Shib Lal and registered it the next day. The consideration of that sale is also mentioned in the deed to be Rs. 4,800 made up of various items mentioned therein.

The words of the deed are :—

“That out of the said consideration-money, Rs. 622 for payment to Chajmal Das, mortgagee, Rs. 134 for payment to Kanhya Lal, and Rs. 406 for payment to Hargo Lal *bania* of Jalalabad, in all Rs. 1,162, were left with the vendee, and Rs. 2,438, due by the vendor to the vendee were credited in the account, and the remaining sum of Rs. 1,200 was received in cash from the vendee and was applied to his use by the vendor.”

It will be observed that this specification mentions the sum of Rs. 622 due on Chajmal Das' mortgage and also the sum of Rs. 406 due to Hargo Lal, but mentions nothing as to the Rs. 900 specified in the sale-deed of the 3rd July 1884 to be due to Dalip Singh. Further, it is to be noticed that in this latter sale-deed no specific mention is made of the hypothecation charge of Chajmal Das, and the other items mentioned in the sale-deed are different to those mentioned in the earlier sale-deed of the 3rd July 1884.

The plaintiff, Bhagwan Das, relying upon his sale-deed of the 3rd July 1884, applied to the revenue authorities for mutation of names in his favour, but his application was resisted by the defendant Shib Lal, on the ground of the sale-deed which he had obtained from Sri Ram on the 8th July 1884. The objections prevailed, and Bhagwan Das' application being disallowed, the name of Shib Lal

was entered in the Government revenue records on the 24th June 1885 as the owner of the ten-biswas share above mentioned.

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Subsequently, Shib Lal executed a *theka* lease of the property on the 14th July 1885 in favour of Ram Prasad, who has in consequence been impleaded as a defendant in this suit.

The abovementioned facts explain the position of the parties in this litigation. The dispute amounts to the question whether the plaintiff Bhagwan Das' sale-deed of the 3rd July 1884 was a valid and perfected conveyance so as to render the defendant Shib Lal's sale-deed of the 8th July 1884 null and void.

The plaintiff came into Court alleging that in accordance with the terms of his sale-deed of the 3rd July 1884 he duly paid Rs. 406 to Hargo Lal and Rs. 900 to Dalip Singh on behalf of the vendor Sri Ram; that immediately after the execution of the deed the plaintiff discovered that besides the sum of Rs. 622 mentioned in the sale-deed to be paid to Chajmal Das on his mortgage, the latter held further hypothecation charges on the property, to the extent of Rs. 2,200; that therefore the plaintiff instead of paying the sum of Rs. 2,872, which was to be paid in cash to the vendor Sri Ram, only paid Rs. 672 to him in cash and kept the balance of the purchase-money for payment of Rs. 622 due on Chajmal Das' mortgage, and the remainder due to him for his hypothecation charges; that the defendant vendor Sri Ram in collusion with Chajmal Das and Shib Lal executed a fraudulent and nominal sale-deed in favour of the latter on the 8th July 1884, and the latter fraudulently and in collusion with Chajmal Das obtained possession and mutation of names on the 24th June 1885, and thereafter executed a *theka* lease in favour of the defendant Ram Prasad. Upon these allegations the plaintiff prayed for proprietary possession of the 10 biswas share by establishment of his right under the sale-deed of the 3rd July 1884, and nullification of the sale-deed of the 8th July 1884.

The suit was resisted by all the three defendants upon similar pleas. They urged that the plaintiff's sale-deed had been fraudulently obtained by him from the defendant Sri Ram; that the plaintiff had

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paid no portion of the purchase-money to the defendant-vendor; that therefore the sale remained inoperative; and that the plaintiff having thus declined to carry out the terms of the sale, the vendor Sri Ram executed the sale deed of the 8th July 1884 in favour of the defendant Shib Lal, who had since redeemed the mortgage of Chajmal Das and had obtained possession.

The Courts below have concurred in finding that the plaintiff's sale-deed of the 3rd July 1884 was a *bona fide* and valid transaction; that in accordance with its terms the plaintiff had paid on behalf of the vendor Sri Ram Rs. 406 to Hargo Lal and Rs. 900 to Dalip Singh; but that he had failed to prove the payment to Sri Ram of Rs. 672, and that he had not paid the mortgage-money due to Chajmal Das owing to the latter's collusion with the vendor Sri Ram and refusal to accept payment of the money. On the other hand, the Courts below have found that the sale-deed of the 8th July 1884 in favour of the defendant Shib Lal was an entirely nominal and fraudulent transaction, being the result of collusion between him and Chajmal Das and Sri Ram; that the defendant Shib Lal was a tool in the hands of Chajmal Das and was in reality acting for him; that "Shib Lal did not pay a pice of the purchase-money or the mortgage-money of the disputed property," although he obtained a receipt of the mortgage-money from Chajmal Das; that "although Shib Lal is shown to be in possession of the disputed property, yet in fact the disputed property is up to this time in the mortgagee possession of Chajmal Das."

Upon these findings the Courts below have decreed the plaintiff's claim for proprietary possession against all the three defendants, subject to the condition that the plaintiff should take an account of what is due to Chajmal Das for his mortgage and hypothecation charges and pay the same to him, and after deducting such amount "whatever will remain out of the purchase-money due by the plaintiff to the defendant-vendor shall be formally recovered by the latter from the former."

From this decree the defendants Sri Ram and Shib Lal appealed to the Lower Appellate Court, and the plaintiff appears to have pre-

ferred cross-objections in respect of so much of the decree as subjected the decree for possession to payment of mortgage-money to Chajmal Das.

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The Lower Appellate Court, however, dismissed *both* the appeal and the cross-objections, thus confirming the first Court's decree.

This second appeal has been preferred only by the defendant Shib Lal on four grounds, of which the third, which impugns the lower Court's finding that Rs. 900 were due by the vendor Sri Ram to Dalip Singh and were paid to the latter by the plaintiff as part of the purchase-money, cannot be entertained in second appeal, as it is a pure question of fact.

In support of the first and second grounds, it is contended that inasmuch as the lower Courts themselves have found that the plaintiff had not paid the full consideration of the sale-deed of the 3rd July 1884, that deed could confer no ownership upon him, and the suit was therefore unmaintainable. It is further argued that the plaintiff-respondent having refused to pay the vendor the amount due to him as purchase-money, the latter was entitled to execute the second sale of the 8th July 1884 in favour of the defendant-appellant, Shib Lal.

In support of this contention the learned pleaders for the appellant rely upon the ruling of this Court in *Ikbāl Begam v. Gobind Prasad* (1), where, under somewhat similar circumstances, it was held that a purchaser who had only paid a portion of the purchase-money could not maintain a suit for possession of the purchased property, as the contract of sale could not be regarded as complete, as there had been "a manifest withholding of the purchase-money." In that case the purchase-money was Rs. 16,000, the sale-deed had been duly executed and registered, and out of the consideration money Rs. 2,000 had been paid in cash to the vendor and the remaining Rs. 14,000 were to be applied by the plaintiff-purchaser towards the payment and discharge of certain bond-debts due by the vendor and charged upon the purchased property. The plaintiff-vendee had not up to the date of the suit paid off those debts, and

(1) I. L. R., 3 All., 77.

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it was held that this omission rendered the sale incomplete so as to preclude the plaintiff from claiming possession as owner of the purchased property.

The Courts below have not followed that ruling holding, as they seem to do, that it was distinguishable from the present case.

I am afraid I cannot take the same view; for if that ruling lays down any rule of law, it goes the length of holding that non-payment of a part of the purchase-money by the vendee prevents the passing of ownership to him and precludes him from suing for possession of the property which he has purchased, although the sale-deed has been duly registered and delivered to him and a portion of the purchase-money has been received by the vendor. If this is a correct interpretation of that ruling, its principle is directly applicable to this case; and here the plaintiff-respondent having distinctly failed to prove the payment of the entire purchase-money, his suit would stand dismissed if the above-mentioned ruling were followed.

I regret, however, with due respect, I am unable to follow that ruling, for it seems to me to proceed upon disregarding the distinction between a *contract of sale* and a *contract to sell*, the former being an executed contract and the latter appertaining to the class of executory contracts. Or, to use the technical language of jurisprudence, sale creates a *jus in rem*, as it passes ownership immediately when it has been executed; and a contract to sell is a *jus ad rem*, for it only creates an obligation attached to the ownership of property and does not amount to an interest therein.

This juristic distinction is fully recognised in s. 54 of the Transfer of Property Act (IV of 1882), and forms the basis of many a rule of law and equity, such as the doctrine of notice to *bona fide* transferees in connection with specific performance of contracts. I may say here that I have had the advantage of conferring with my brother Straight, who was one of the learned Judges who decided the case of *Ikbal Begam v. Gobind Prasad* (1) with regard to that ruling, and he has authorised me to say that, so far as he is concerned, he has more

(1) I. L. R., 8 All., 77.

than once stated from the Bench that the case was always a very doubtful authority and that since s. 54 of the Transfer of Property Act came into force, it can no longer be considered as an authority.

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Now, in the present case, the Courts below have found that the sale-deed of the 3rd July 1884 was duly executed, registered and delivered to the plaintiff-vendee, who has paid a portion of the purchase-money to the vendor's creditors. I hold that these facts in themselves amount to a full transfer of ownership to the plaintiff-vendee, notwithstanding the circumstance of his having either omitted, refused or been unable to pay the balance of the purchase-money to the vendor Sri Ram or the mortgagee Chajmal Das. The plaintiff could therefore maintain this suit, which is in the nature, not of an action for specific performance of contract, but an action for ejectment. Such an action can be maintained by any one who, like the plaintiff in the present case, has acquired the ownership of immovable property, though, of course, in a case such as this, in common with some other classes of cases, equities may exist in favour of the defendant, so as to subject the decree for possession to restrictions and conditions appropriate to the circumstances of each case.

In the present case, however, no such equities can exist in favour of the defendant-appellant Shib Lal, who, as I have already said, has been found by the Court below to have obtained the sale-deed of the 8th July 1884 with knowledge of the plaintiff's earlier sale-deed of the 3rd July 1884, and to have paid no portion of the purchase-money nor to have obtained possession of the property, but to have acted simply as a nominal vendee in the interests of the mortgagee Chajmal Das, who was in collusion with the vendor Sri Ram defendant.

It follows from what I have said that there is no force in the contention urged in the second ground of appeal, that in consequence of the non-payment by the plaintiff of a portion of the purchase-money of the sale-deed of the 3rd July 1884, the vendor Sri Ram had any rights in the property to convey to the appellant by the sale-



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deed of the 8th July 1884. This view is supported by the principle of the rulings of this Court in *Mohun Singh v. Musammat Shib Koonver* (1), *Goor Prasad v. Nunda Singh* (2), and by the ruling of the Bombay High Court in *Umedwal Motiram v. Dava* (3), which was a much stronger case than the present, because there the vendee had paid no portion of the purchase-money, and having confessed his inability to pay the same, had returned the sale-deed to the vendor. These various rulings are not in full accord with each other as to the exact form of the decree which should be passed in such cases, but they are unanimous in laying down the principle that non-payment of a portion of the purchase-money does not prevent the passing of ownership from the vendor to the vendee, and that such vendee can maintain a suit for possession.

The ruling in *Goor Prasad v. Nunda Singh* (2), so far as it declares that a decree for possession in favour of a vendee who has paid only a portion of the purchase-money cannot be subjected to a condition of payment of balance of the purchase-money, is, as I respectfully think, scarcely consistent with the procedure and rules of the Courts of equity and the rulings which I have cited. But as I have already said, the present appellant Shib Lal is entitled to no equities such as would require any modification of the lower Court's decree, so far as he is concerned, and I need not dwell upon the matter any further.

It now remains only to dispose of the contention urged in the fourth ground of appeal which proceeds upon the assumption that Chajmal Das, the mortgagee, had transferred his rights to the appellant. Upon this assumption it is contended that the appellant was entitled to some kind of lien upon the property in suit.

As to this part of the case it is enough to say that the findings of fact at which the lower Courts have arrived contradict the assumption upon which the plea proceeds. They have found that the appellant paid nothing either to the vendor, Sri Ram, or to the mortgagee, Chajmal Das, and that his position in the matter was

(1) N.-W. P. H. C. Rep., 1866, p. 85. (2) N.-W. P. H. C. Rep., 1866, p. 160.  
 (3) I. L. R., 2 Bom., 547.

merely a nominal one in collusion with Chajmal Das, mortgagee who was still in possession. The findings therefore indicate no such transfer of mortgagee's rights by subrogation or otherwise as would entitle the appellant Shib Lal to any modification of the lower Court's decree, and since Chajmal Das was no party to this litigation, and the other two defendants Sri Ram and Ram Prasad have not joined in this appeal, the case requires no further discussion, their rights not being involved in this appeal.

I dismiss the appeal with costs.

BRODHURST, J.—I concur in dismissing the appeal with costs.

*Appeal dismissed.*

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*Before Mr. Justice Straight and Mr. Justice Mahmood.*

1888

November  
29.

BHUPAL RAM (DEFENDANT) v. LACHMA KUAR AND OTHERS (PLAINTIFFS).\*

*Hindu law—Hindu widow—Alienation by widow to her married daughter—  
Reversioner—Declaratory suit—Act I of 1877 (Specific Relief Act), s. 42.*

The effect of a gift by a Hindu widow of her deceased husband's estate to her daughter is merely to accelerate the latter's succession and put her by anticipation in possession of her life-estate, and therefore affords no cause of action to a reversioner to maintain a declaratory suit impeaching the gift.

*Per MAHMOOD, J.*, that in the exercise of the discretion allowed to the Court by s. 42 of the Specific Relief Act, a declaratory decree should be refused to the plaintiff in such a case where the donee was a married woman and capable of bearing a son who would be the next reversioner to the full ownership of the estate of the donor's deceased husband.

*Indar Kuar v. Lalla Prasad Singh* (1) and *Udhar Singh v. Ranee Koonwar* (2) referred to.

THE facts of this case are stated in the judgment of Straight, J.

The Hon. *T. Conlan* and Pandit *Ratan Chand* for the appellant.

Maulvi *Abdul Majid*, the Hon. Pandit *Ajudhia Nath*, and Mir *Zahur Husain* for the respondents.

STRAIGHT, J.—This appeal relates to a declaratory suit brought by the plaintiff-appellant before us in the Court of the Subordinate

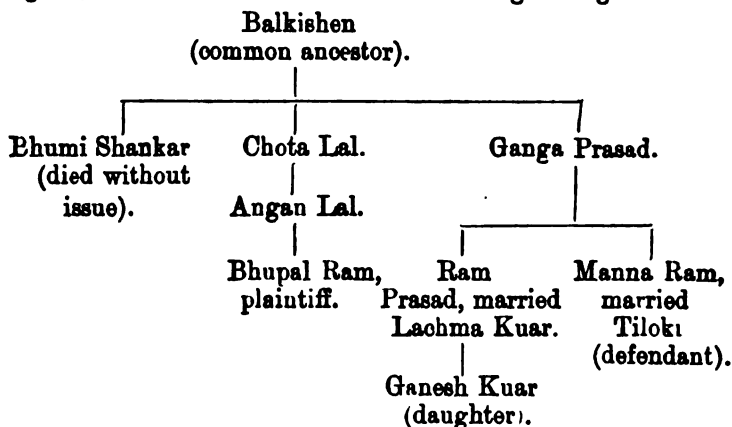
\* First Appeal No. 29 of 1887 from a decree of Maulvi Mirza Abid Ali Khan, Subordinate Judge of Shajahanpur, dated the 10th November 1886.

(1) 1 L. R., 4 All., 532.

(2) 1 Agra, 234.

1888 Judge of Shaháranpur, on the 10th April 1886. In order to make the grounds upon which I am about to dispose of this appeal intelligible, it will be convenient here to state a genealogical tree :—

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From the above genealogical tree it will be seen that Balkishen had three sons, of whom Bhumi Shankar died without issue. Ganga Prasad had two sons, of whom Manna Ram predeceased Ram Prasad, leaving behind him a widow named Tiloki Kuar. Ram Prasad therefore succeeded to the property of Manna Ram, and when he died he left a widow named Lachma Kuar and a daughter Ganesh Kuar. The ground on which the plaintiff comes into Court is that, upon the 20th April 1883, Lachma Kuar, the widow of Ram Prasad, and Tiloki Kuar, the widow of Manna Ram, joined together in executing a deed-of-gift in respect of certain property which had belonged to Ram Prasad and Manna Ram. It is not necessary for the purpose of disposing of this appeal to enter into the question of fact, which arose in the case in the Court below, or to discuss the grounds upon which the learned Subordinate Judge dismissed the plaintiff's suit. It is enough for the purposes of this judgment to deal with the two questions which have been raised here to-day as an answer to the appeal preferred by the plaintiff, the answer being upon grounds of law and law only :—First, that in the presence of Ganesh Kuar, the plaintiff, even admitting him to be the son of Angan Lal, had no *locus standi* to maintain the suit; and, secondly that, looking to the nature of the transaction of gift and the position of the donee,

Ganesh Kuar, no cause of action had accrued to the plaintiff to entitle him to come into Court and maintain this declaratory suit. Upon the first question, as to the *locus standi* of the plaintiff, had any contest taken place in regard to that, it might possibly have brought two rulings of my brother Mahmood and myself, one reported at page 428, and the other at page 431 of the Indian Law Reports, 6 Allahabad, *Madari v. Malki*, and *Balgobind v. Ram Kumar*, into conflict. But fortunately that conflict is avoided, and it becomes unnecessary for us jointly to consider the correctness or otherwise of our respective rulings, because Pandit *Ajudhia Nath*, who represents the respondents here, says that he does not question the *locus standi* of the plaintiff to come into Court and maintain his action. In other words, he is willing to concede that, by the united action of Lachma Kuar and Tiloki Kuar, the plaintiff, as the next reversioner, was entitled to pray for the declaratory relief which he has sought by this suit. Consequently the first contention need not be further dealt with, and it is only necessary for me to consider the second argument addressed to us on behalf of the respondents, namely, that the plaintiff had no cause of action upon which he was entitled to maintain such a suit as that which he has now brought. It is to be observed from the genealogical tree above given that the donee, under this deed-of-gift from Tiloki and Lachma Kuar, was the daughter of Lachma Kuar. It is clear that the whole of the property which had belonged to Manna Ram had passed into the hand of Ram Prasad, the father of the girl Ganesh Kuar, and that in the ordinary course of succession after the death of Ram Prasad, his widow Lachma Kuar will first take the life-estate, and upon her decease the daughter will take the life-estate, subject of course to any son being born to her. The effect, therefore, of the transaction of gift, which took place upon the 28th April 1883 is nothing more nor less than, to use the words of my brother Mahmood, in the case of *Indar Kuar v. Lalta Prasad Singh* (1) "to accelerate her succession to the property and to entitle her to immediate succession." In other words, all the effect that this deed-of-gift had was to put Musammat Lachma Kuar out of possession of her life-estate and to

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(1) I. L. R. 4. All., 532.

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put Ganesh Kuar, her daughter, by anticipation into possession of her life-estate. There is another authority for this view of the matter in *Udhar Singh v. Ranees Koonwur* (1), where it was held by Chief Justice Sir Walter Morgan and Mr. Justice Pearson, that a reversioner has no present ground of action to set aside a transfer made by a widow in favour of her daughter, as his reversionary right was not prejudiced thereby. This is also a distinct authority for holding that no cause of action accrued to this plaintiff to come into Court and ask for a decree such as that which he sought in the present suit. Under these circumstances and upon these grounds without entering into the merits of the learned Subordinate Judge's decision, I am of opinion that this appeal should be, and it is, dismissed with costs.

MAHMOOD, J.—I am of the same opinion, and as my learned brother has pointed out that in the two cases, *Madari v. Malki* (2) and *Balgobind v. Ram Kumar* (3), the views which my learned brother and I gave expression to are somewhat in conflict, it is unnecessary to explain that conflict, or to arrive at any definite conclusion so far as the question of *locus standi* is concerned, because as the learned Pandit has conceded, in either case, the fact that Ganesh Kuar is the donee from Lachma Kuar, would prevent any such plea being raised against the present plaintiff-appellant as that of absence of *locus standi*, if his allegation of the relationship with the deceased Ram Prasad is to be accepted. I must not, therefore, be understood to lay down any rule in this case on that point.

The next thing I wish to say is, that this is admittedly a declaratory suit, and, therefore, a suit governed by the provisions of s. 42 of the Specific Relief Act (I of 1877). That enactment, and that clause in itself, contains the quintessence of the rule of equity governing such matters and guiding the practice of the Courts of Chancery in England. The words of that section are clear, and it only affirms the practice of the English Court of Chancery when it says that a declaratory relief is not a matter of right, and is in the discretion of the Court. Here the lower Court, although it has

(1) 1 Agra, 224.

(2) I. L. R., 6 All., 428.

(3) I. L. R. 6 All., 431.

passed its judgment upon matters of evidence, has practically come to the conclusion that the plaintiff should not be allowed to have declaratory relief. I am afraid that the Court was wrong in thinking that there was a cause of action entitling the plaintiff to maintain such a suit. My opinion is that, if for no other reason, the solitary reason that this lady, Ganesh Kuar (who is admittedly living and a married daughter of the last full proprietor), is the donee, and that she is a married woman, her husband being still living, would be enough to require that a proper exercise of discretionary powers should not include a decree such as the plaintiff demanded. Therefore the conclusion of the judgment of the Court below is just the result which my learned brother Straight has arrived at, though by a different process of reasoning. It is the same as that at which I have also arrived, for the reason that the donee, Ganesh Kuar, is a married woman, and having the possibility of bearing a son, who would be the next reversioner to the full ownership of the estate of Ram Prasad. I agree in the judgment and the decree which my learned brother has made.

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*Appeal dismissed.*

*Before Mr. Justice Straight and Mr. Justice Mahmood.*

KUAR DAT PRASAD SINGH (DEFENDANT) v. NAHAR SINGH AND OTHERS  
(PLAINTIFFS).\*

1888  
*November 30.*

*Pre-emption—Wajib-ul-ars—Partition of village into separate mahals—New  
wajib-ul-ars for each mahal.*

Cases where, after the division of a village area into separate mahals for which no new *wajib-ul-ars* is drawn up, the old *wajib-ul-ars* for the whole area has been held to apply generally to the new mahals, and such division has been held not to affect covenants existing between the co-sharers under such *wajib-ul-ars*, distinguished from cases where a new *wajib-ul-ars* has after the division been drawn up for each mahal. *Gokal Singh v. Mannu Lal* (1) and *Jai Ram v. Mahabir Rai* (2) referred to.

THE facts of this case are stated in the judgment of Straight, J.

The Hon. T. Conlan, Mr. G. E. A. Ross and the Hon. Pandit *Ajudhia Nath* for the appellant.

\* First Appeal No. 83 of 1887 from a decree of Babu Abinash Chandar Banerji, Subordinate Judge of Aligarh, dated the 6th December 1886.

(1) I. L. R., 7 All., 772;

(2) I. L. R., 7 All., 720.

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Mr. C. H. Hill, Babu Jogendro Nath Chaudhri and Pandit Sundar Lal for the respondents.

STRAIGHT, J.—This appeal relates to a suit for pre-emption, which was instituted by the plaintiffs-respondents before us in the Court of Subordinate Judge of Aligarh on the 30th June 1886. The sale-transaction which the plaintiffs assailed was embodied in two sale-deeds of the 30th June 1885, relating to several properties in which one Joti Prasad, who was defendant No. 1 in the Court below was the vendor, and Kuar Dat Prasad Singh, minor, was the vendee, such minor through his guardian, Raja Ghansham Singh, being the second defendant in the present suit, and the appellant in this Court. I have said that the sale-deed of the 30th June 1885 comprehended several properties. We, in the present litigation, are alone concerned with the property known as “Jawar Kharga Bahadur,” because it is admitted that in respect of the other properties which were comprised in the sale-deeds, the plaintiffs had no right of pre-emption. The plaintiffs’ case was that they being co-sharers in patti Nahar Singh, which was one of the two pattis of Mahal “Jawar Kharga Bhadur,” had a preferential right to purchase that portion of the property sold to which I have referred, to the defendant, who was a co-sharer in one of the pattis of the mahál Kanetpur. The plaintiffs’ father alleged that the consideration recited in the sale-deed was untruly recited; that the whole consideration paid in respect of the villages passed under those deeds was Rs. 12,000; and that, proportionately to the value of other properties sold, the amount that they should be called upon to pay in respect of that portion of the property to which they asserted their right of pre-emption, was Rs. 3,758-10-4.

The learned Subordinate Judge who tried the case has come to the conclusion that the plaintiffs established their rights of pre-emption; and secondly, that looking to the terms of the *wajib-ul-arz* and the relative value of the property in the villages adjacent to that in which the property sought to be pre-empted was situate, the amount the plaintiffs should be called upon by the decree to pay was Rs. 7,000. It is this decision of the Subordinate Judge which is

assailed by this first appeal before us Only two contentions have been put forward by the learned counsel for the vendee, defendant-appellant; the first of which is that the plaintiffs had no better right in mauza "Jawar Kharga Bahadur" than the defendant; secondly, that the findings of fact recorded by the Subordinate Judge upon the question of consideration were unsustainable, and that the vendee, even if the plaintiffs' right were established, was entitled to a sum considerably in excess of that which had been declared by the learned Subordinate Judge. The first of these pleas can readily be disposed of, when I have stated one or two admitted facts in the case and then applied to the state of things connected with the village, the terms of the *wajib-ul-arz* governing the case. It appears that prior to the settlement which took place somewhere about the year 1872, there was a village area known as "Jawar," which at the settlement was divided into two mahals, one of which was called "Jawar Kharga Bahadur" and the other "Kanetpur." Almost synchronously with this division of the village into two mahals, each of those two separated mahals was divided into two pattis, that is to say, "Jawar Kharga Bahadur" was divided into patti "Joti Prashad," and patti "Nahar Singh," while the mahal "Kanetpur" was divided into patti "Raja Tikam Singh" and patti "Tarf Karsan." Such being the divisions first for revenue purposes, and secondly for the convenience of the co-sharers, on the 4th March 1873, a *wajib-ul-arz* was prepared; that is to say, there was one *wajib-ul-arz* prepared for the mahal "Jawar Kharga Bahadur," and another for the mahal "Kanetpur." With this latter *wajib-ul-arz* we are not concerned, for the determination of the plaintiffs' right of pre-emption rests upon the language of the *wajib-ul-arz* of mahal "Jawar Kharga Bahadur." Now, the terms of that *wajib-ul-arz* are as follows:—"We, the proprietors, are competent to transfer our respective property, but the condition is that, in the first instance, it shall be transferred to our relatives (*bhaibandee*), who may be the sharers of another patti; if they refuse to purchase, then to the sharers of another patti, and when none of the sharers of the village should agree to take, then to any one else. In case of dispute about

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the price against the pre-emptor, the price shall be settled according to the custom prevailing in the adjacent villages." I may at once say that it is unnecessary upon this portion of the case to go further into that *wajib-ul-arz*, because it seems to me that I have stated enough of it to lay a foundation for the view that I have formed as to the pre-emptive right of the plaintiffs. I have already stated that mahál "Jawar Kharga Bahadur" was divided into two pattis, one of which was patti Joti Prasad and the other patti Nahar Singh. Now Joti Prasad, whose name is mentioned there, is the vendor under the two sale-deeds of the 30th June 1885, which are impeached by the present suit; and Nahar Singh, who is mentioned there, is one of the plaintiffs in the present suit, he having two brothers who are associated with him as plaintiffs. Now, in my opinion, by way of illustration of the mode in which it seems to me that his *wajib-ul-arz* should be applied, I should say that upon its terms, supposing Nahar Singh had proposed to sell any portion of his property, it would have been his duty to offer such portion for sale first to his brothers and then subsequently to Joti Prasad. Consequently, this present case being the converse of that position, it was incumbent upon Joti Prasad to offer the property to the present plaintiffs, and in not doing so, he has infringed the pre-emptive right which by that *wajib-ul-arz* was conferred upon the plaintiffs, and the plaintiffs were entitled, as the Subordinate Judge has found, to come into court and maintain the present suit. It must be distinctly understood that this view of this particular *wajib-ul-arz* in no way ignores any other decision that may have been passed in cases where one *wajib-ul-arz* having existed for the purpose of a common village area, and that village area having been divided into separate revenue areas and no *wajib-ul-arz* having been drawn up, such *wajib-ul-arz* has been held to apply generally to the new area. The principle upon which that view of the law is based is to be found stated in the case *Gokal Singh v. Mannu Lal* (1) and this principle, which is further elaborated in another ruling at page 720 of the same volume (*Jai Prasad v. Mahabir Rai*) is that this pre-emptive right runs

(1) I. L. R., 7 All., 772.

(2) I. L. R., 7 All., 720.

with the land, and the division of that land for the purposes of the revenue in no way affects any covenant or agreement existing between the co-sharers. So much for the first point. I am of opinion that the Subordinate Judge rightly held that the plaintiffs were entitled to maintain the suit.

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Then comes the question as to whether the Subordinate Judge was right or wrong in his view of the consideration which ought to be recouped to the vendee by the plaintiffs upon taking the property. Mr. *Conlan* has called our attention to the terms of the *wajib-ul-arz*, as they affect this part of the case, and it may be observed here that the passage as it is translated and printed in the paper-books is not correct. My brother Mahmood tells me that the exact translation is this:—"In cases of dispute about the price against the pre-emptor a price shall be settled according to the price of similar property prevailing in the adjacent villages." That is to say, the determination of the price of a particular property is to be determined according to the ordinary and general value of similar property prevailing in adjacent villages. The Subordinate Judge has found as a fact, in reference to this particular point, that Rs. 7,000 is the fair "market-value" of this particular portion of mahál "Jawar Kharga Bahadur," which was sold by Joti Prasad to Kuar Dat Prasad Singh, the vendee. It appears to me therefore that it is wholly unnecessary to go into the extremely unpleasant matters with which a part of the learned Subordinate Judge's judgment is concerned, *viz.*, as to whether, aye or no, the total amount of consideration recited in the two sale-deeds of 30th June 1885 was or was not truly represented, more especially as it has been held by the Full Bench in the case of *Karim Bakhsh v. Phula Bibi* (1) that these covenants with regard to price are covenants which run with the land. I may also add that, looking at the matter from this point of view, Mr. *Hill*, who had filed applications under a 561, Civil Procedure Code, has stated that he does not purpose to support those objections. Consequently the matter stands thus, that we have nothing before us which would warrant us in coming to a conclusion

(1) I. L. R., 8 All., 102.

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other than that of the learned Subordinate Judge, namely, that the fair market value of the property to be pre-empted is Rs. 7,000. Such being the view I take upon the two points raised by Mr. Conlan for the appellant, the appeal must be, and it is, dismissed with costs. The objections filed under s. 561 of the Civil Procedure Code are disallowed with costs.

MAHMOOD, J.—I have nothing to add to what has fallen from my learned brother, because I agree in all that he has said.

*Appeal dismissed.*

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 March 15.

## CRIMINAL REVISIONAL.

*Before Mr. Justice Straight.*

QUEEN-EMPRESS v. INDARJIT.

*Act XIII of 1859, preamble and s. 2—Wilful breach of contract—Construction of statute—Preamble not to be construed as restricting operation of enacting part—Summary trial—Criminal Procedure Code, s. 260.*

Offences under s. 2 of Act XIII of 1859 are triable summarily under s. 260 of the Criminal Procedure Code.

The offence made punishable by s. 2 of Act XIII of 1859 is the wilful and without lawful and reasonable excuse neglecting or refusing to perform the contract entered into by persons whom the Act concerns. Notwithstanding the preamble of the Act, it is not necessary to prove that a breach of contract is fraudulent in order to sustain a conviction under s. 2. *Taradoss Bhattacharjee v. Bhaloo Sheikh* (1) dissented from.

Where the enacting sections of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation, or to cut them down.

THIS was an application for revision of an order of the Sessions Judge of Cawnpore, affirming an order of the Joint-Magistrate convicting and sentencing the petitioner for an offence punishable under s. 2 of Act XIII of 1859 ("an Act to provide for the punishment of breaches of contract of artificers, workmen, and labourers in certain cases"). The petitioner was a carding mistri, who, by an agreement in writing, dated the 22nd March 1888, bound himself to serve the Elgin Mills Company at Cawnpore for three years excepting leave or "on some emergent occasion" of which he should

(1) 8 W. B. Cr., 69.

give previous notice. The second clause of the instrument was as follows :—

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“ I further agree that with the exception of the circumstances mentioned above, if within the period for which I have engaged to serve, I shall absent myself, or refuse to work, or take up service with some other Mills Company or firm or with some private person at Cawnpore or somewhere else, then I shall pay Rs. 99, the settled and fixed consideration, to the Elgin Mills Company aforesaid, and that sum it will realize from me in the coin current in India, or the Company shall take credit for the amount held by them as due to me, by holding me liable for the same, and I shall also be liable for payment of the penalty provided by Act XIII of 1859 on account of making any breach of contract in respect of rendering services entered in this document.”

At the time when he signed this instrument, the petitioner received from the managers of the Company an advance of Rs. 3. On the 1st November 1888, he gave his employers twenty-four hours' notice to quit, which was not accepted. He then applied for eight days' leave to bathe in the Ganges. This application was refused, but a promise was made that it should be reconsidered subsequently. He thereupon threw down his keys, went away, and never returned to his service. At that time Rs. 19-10-9 were due to him for wages, and this sum was not paid to him, as he went away without claiming it.

The petitioner's employers lodged a complaint against him under s. 2 of Act XIII of 1859. The defence was that the petitioner had not understood the agreement of the 22nd March 1888, and that he left his employment because one of the managers abused him. The case was tried summarily by the Joint-Magistrate of Cawnpore, who convicted the accused in the following terms :—

“ It is perfectly clear that Indarjit left his employment without reasonable excuse, and inasmuch as he has contracted with the Elgin Mills Company to serve them for three years, and received Rs. 3 as an advance towards such service, he is liable to the provisions of

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ss. 1 and 2 of Act XIII of 1859. I therefore order him under s. 2 to return to his service under the pains and penalties mentioned in that section, and complete his contract. Complainant's actual expenses will be defrayed by accused."

An appeal was preferred from this order to the Sessions Judge of Cawnpore, and it was contended, *inter alia*, that the Joint Magistrate ought not to have tried the case summarily, and that he had no jurisdiction to deal with it at all. With reference to these pleas, the Sessions Judge observed that the prisoner's offence was "punishable with imprisonment for less than six months; therefore under s. 260 of the Criminal Procedure Code, it has rightly been tried summarily by an officer empowered to try summary cases. Act XIII of 1859 was extended to Cawnpore by Notification No. 926 A of the 22nd December 1862. The question raised in the first plea is whether the Joint Magistrate, Mr. Ferrard, under s. 5 and the Notification, was legally competent to try the case. The appellant had to show me that the Joint Magistrate had no authority. This he has not attempted to do. I accordingly dismiss the appeal."

The present application was for revision of this order. It was based mainly on the contention (i) that the Joint Magistrate had no power to try the case summarily, and (ii) that with reference to the preamble of Act XIII of 1839, before a conviction could be legally had under the Act, it must be proved that the breach of contract complained of was fraudulent.

Mr. C. Dillon and Mr. J. Simeon, for the petitioner.

The Public Prosecutor (Mr. G. E. A. Ross), for the Crown.

STRAIGHT, J.—This is an application for revision of an order of the District Judge of Cawnpore, dated the 4th December, 1888, confirming an order of the Assistant Magistrate of the same place, dated the 21st November. Such last-mentioned order was passed under s. 2 of Act XIII of 1859, and by it the petitioner was ordered to return to his service under the pains and penalties mentioned in that section, and to complete his contract and to pay the complainant's cost. The facts found by the Magistrate were as follows:—On the

22nd March, 1889, Indarjit, the petitioner, entered into a contract with the manager of the Elgin Mills Company, Cawnpore, to serve them as a carding mistri for a period of three years, and upon signing that contract an advance of Rs. 3 was paid to him. On the 1st November 1888, he tendered twenty-four hours' notice of his intention to quit the service. Such notice was not accepted by his employers; and thereupon having applied for eight days' leave "to bathe in the Ganges," which was refused him, though his application was promised to receive subsequent consideration, he threw down his keys and left his service and did not return. It is admitted by the managers of the Elgin Mills, who are complainants in this case, that at the date of his departure from service a sum of Rs. 19 odd was due to him. Upon these facts the prosecution was instituted, as I have already mentioned, under s. 2 of Act XIII of 1859. Upon a consideration of all these circumstances, the Magistrate came to the conclusion that the requirements of the statute were satisfied, and that the petitioner had rendered himself liable to its provisions. That order of the Magistrate was upheld by the Judge, and I am invited by this application for revision to say that both orders are bad in law upon two grounds; first, that the Magistrate had no jurisdiction to try this complaint by a summary trial; secondly, that even if he had jurisdiction, the facts found did not bring the case within the provisions of Act XIII of 1859. With regard to the first of these points, I have no doubt that the Magistrate had jurisdiction to try the case summarily, and that under the Criminal Procedure Code full power was given him to do so. The second point is not without difficulty. The argument that has been addressed to me in support of it by Mr. *Dillon* on behalf of the petitioner is to the following effect:—He says, looking to the preamble of Act XIII of 1859, an essential ingredient required to be proved in order to sustain a conviction under s. 2 of that Act is the ingredient of fraud, for in the preamble it is said that the mischief aimed at is "fraudulent breach of contract" on the part of artificers, workmen, and labourers, and the object of the Act, the punishment of such "fraudulent breaches of contract." In support of this view he has no doubt direct authority in the case of *Tarados*

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1889 *Bhattacharjee v. Bhaloo Shaikh* (1), and if I could follow that judgment without hesitation, there need be no difficulty in disposing of this case. But with the greatest respect for the learned Judges who decided that case, it seems to me that they have interpreted this Act mainly, if not entirely, with reference to the language of the preamble, and not in reference to the enacting clauses contained therein, which declare what shall be an offence and what shall be its punishment. There can be no doubt, whether it be the fault of insufficient or ineffective drafting, that the preambles to statutes do not always cover, in the wide and general terms in which they are necessarily couched, all the specific offences which are to be found provided for within the enacting portions of the statute itself. I understand it to be an undoubted rule of construction that where the language of the enacting sections of a statute is clear, the terms of a preamble cannot be called in aid to restrict their operation, or to cut them down. The purpose for which a preamble is framed to a statute is to indicate what in general terms was the object of the Legislature in passing the Act, but it may well happen that these general terms will not indicate or cover all the mischief which in the enacting portions of the Act itself are found to be provided for. For example, a striking illustration is referred to by Sir Peter Maxwell in his work on the Interpretation of Statutes, in which he refers to the statutes 4 and 5 Ph. and M. c. 8, in which the preamble spoke only of the Act being directed to the abduction of heiresses and other girls with fortunes, yet the body of the Act was applicable to and made penal the abduction of all girls under sixteen years of age. Many other illustrations are given by Sir Peter Maxwell in his book at page 58 *et seq* which go to support the principle I have stated. It is true that in this Act, XIII of 1859, the preamble does speak of fraudulent breaches of contract and punishment therefor; but when I come to look into the section which invests a Magistrate with powers under the Act to deal with the persons brought before him, I find that the element he is to look for as going to constitute the offence under s. 2, is the wilful, and

(1) 8 W. R., Cr., 69.

without lawful and reasonable excuse, neglecting or refusing to perform the contract entered into by the persons whom the Act concerns. There is no mention in that section of the word "fraudulent," and in my opinion it is legislating and not interpreting an Act of the Legislature to read that word into the section. Consequently, I am of opinion that this conviction was a right one, because upon the facts found there was most undoubtedly a wilful, and without lawful and reasonable excuse, neglect and refusal to perform the contract of service which the petitioner had entered into. I need not point out the importance of statutory provisions of this kind, and their being enforced in large commercial centres like Cawnpore, where, by combined action on the part of persons employed in large commercial establishments there, the proprietors of those establishments might be placed not only at very grave and sudden inconvenience, but very serious pecuniary loss. This application is refused.

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*Application rejected.*

## FULL BENCH.

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*August 11.*

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.*

MUHAMMAD SULAIMAN KHAN AND OTHERS (PETITIONERS) v. MUHAMMAD YAR KHAN AND ANOTHER (RESPONDENTS).

*Practice—Amendment of decree—Decree affirmed on appeal—Jurisdiction—Civil Procedure Code, ss. 206, 579, 623, 624—Limitation—Review of judgment—Res judicata.*

The effect of s. 579 of the Civil Procedure Code is to cause the decree of the Appellate Court to supersede the decree of the first Court, even where the appellate decree merely affirms the original decree and does not reverse or modify it.

Where a decree has been affirmed on appeal, the only decree which can be amended, under s. 206 of the Code, is the decree to be executed, and the decree to be executed is that of the appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree.

The only court which has jurisdiction to amend the appellate decree is the Court of appeal.



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So held by the Full Bench, MAHMOOD, J., dissenting. *Shohrat Singh v. Bridgman* (1) explained and followed. *Kistokiakur Roy v. Raja Burrodacount Roy* (2), discussed.

The insertion of the word "not" in the last line but one of the judgment and also in the head-note in *Shohrat Singh v. Bridgman* (1) was a clerical error.

*Per* MAHMOOD, J.—Where a decree has been simply affirmed on appeal, s. 579 of the Code does not imply that the appellate decree supersedes the original decree so as to render it ineffective for purposes of execution. In such a case, the Lower Court continues to have jurisdiction to entertain an application for amendment of its own decree under s. 206 of the Code; and such application is not governed by any article of the Limitation Act, and may be made at any time. It may be granted under s. 206, even where an application for review of judgment under s. 623 upon the same grounds would be barred by s. 624.

A decree awarding the plaintiffs possession of immoveable property did not comply with s. 206 of the Code by containing the particulars of the claim or specifying clearly the relief granted. On appeal by the defendant, the High Court, in general terms, confirmed the decree and dismissed the appeal. The decree-holders then applying for execution, the judgment-debtors objected that the decree was incapable of execution, and this objection was allowed by the High Court on appeal. The decree-holders applied to the High Court to amend its decree, but the application was refused; and they then made a similar application to the first Court to amend its original decree which had been affirmed on appeal. This application was granted by a Judge who was not the Judge who had passed the original decree.

*Held*, by the Full Bench (MAHMOOD, J., dissenting) that the Court below had no jurisdiction to make such amendment, the original decree having been superseded by the High Court's appellate decree.

*Held* by MAHMOOD, J., *contra*, that the court below had jurisdiction to make such amendment and could make it at any time; that the High Court's decree could not be amended, because the former order refusing amendment had become final and operated as *res judicata*; that the amendment of the original decree under s. 206 was not barred by s. 624; and that it would be denying justice on account of technicalities to hold that the original decree, though affirmed on appeal, could be neither executed nor amended.

THE facts of this case were as follows. On the 26th June, 1877, a suit was instituted in the Court of the Subordinate Judge of Aligarh for establishment of right to and possession of certain immoveable property by Muhammad Ali Khan and others against Muhammad Sulaiman Khan and others. In the plaint the villages of which possession was claimed were not named, but were generally referred to as "detailed below." No details were given in the

(1) I. L. R. 4 All. 376.

(2) 14 Moo. I. A. 465.

plaint itself, but a separate paper containing a list of villages was filed with the plaint. On the 22nd June, 1878, the plaintiffs obtained a decree for possession of "all the villages claimed," but the decree contained no indication as to what those villages were. The defendants appealed from the decree to the High Court, which, on the 8th February, 1882, passed a decree in the following terms :—"That the decree of the Subordinate Judge of Aligarh be confirmed, and this appeal be and it hereby is dismissed."

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The decree-holders subsequently applied for execution of the decree in the Court of the Subordinate Judge. The judgment-debtors then, for the first time, objected that the decree was incapable of execution because it did not, as required by s. 206 of the Civil Procedure Code, specify the shares or the names of the villages decreed in favour of the plaintiffs. The Subordinate Judge disallowed the objection. On appeal the High Court set aside the Subordinate Judge's order, holding that the Court executing the decree was not justified in reading into the decree the contents of the list of villages attached to the plaint and in awarding the decree-holders possession of the villages named in such list. The Court added :—"It is plain that the decree was defective, in that it did not contain 'the particulars of the claim,' and failed to 'specify clearly the relief granted.' The proper and only course open to the decree holders was to procure the remedy of these defects according to law." The judgment of the High Court was reported in *Muhammad Sulaiman v. Muhammad Yar* (1).

On the 6th March, 1884, the decree-holders filed a petition praying for amendment of the High Court's decree. On the 8th May, 1884, the petition was disposed of by Oldfield, J., in the following terms :—"There is no case made out for correcting the decree of this Court, which is correct."

On the 6th February, 1885, the decree-holders filed an application in the Court of the Subordinate Judge praying for amendment of his decree of the 22nd June, 1878. The judgment-debtors opposed this application on the ground that the Subordinate Judge had no

(1) 1. L. R., 6 All. 30.

1888 jurisdiction to grant it, and also that it was barred by limitation under art. 178 of sch. ii of the Limitation Act (XV of 1877), with reference to *Gaya Prasad v. Sikri* (1). The Subordinate Judge, on the 20th July, 1885, overruled both objections, holding in regard to the first that he had power, under s. 206 of the Civil Procedure Code, to make the decree conformable to the judgment, and in regard to the second, that the right to make the application should be treated as having accrued on the 16th August, 1883, when the High Court decided that the decree was not capable of execution, and that the proper remedy of the decree-holders was to apply for amendment.

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The judgment-debtors applied to the High Court, under s. 622 of the Civil Procedure Code, for revision of the Subordinate Judge's order. The grounds stated in the petition for revision were as follows:—

"1. Because the application of the respondents was barred by limitation.

"2. Because s. 206 of the Code of Civil Procedure is not applicable to this case, and the decree could not be amended.

"3. Because the Subordinate Judge could not amend the decree of his predecessor.

"4. Because the decree could not be amended at the stage at which it was amended.

"5. Because there was no valid reason for amending the decree in the manner in which it was amended."

The application came for hearing before Straight and Brodhurst, JJ., who referred it to the Full Bench upon a preliminary question, the judgment upon which is reported in I. L. R., 9 All. 104. When the case again came before the Division Bench, their Lordships made a further reference of the case to the Full Bench stating the following as the main questions which required determination:—

"1. When the decree of a Subordinate Court has been confirmed or modified in appeal, what Court has jurisdiction to entertain an application for amendment under s. 206 of the Civil Procedure Code ?

(1) I. L. R., 4 All. 23.

"2. What, if any, article of the limitation law governs such applications ?

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"3. If it is determined that the application of the 6th March, 1884, was properly made to this Court, is the question of amendment of decree concluded, on the principle of *res judicata*, by the order of Oldfield, J., of the 8th May, 1884 ? "

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Their Lordships added that they stated these points "without prejudice to the pleaders on either side urging any other questions that properly arise upon the grounds stated in the petition of revision."

The Hon. Pandit *Ajudhia Nath* and Munshi *Harkishen Das* for the petitioners.

Mr. *C. H. Hill*, Mr. *Dwarka Nath Banerji*, and Pandit *Sundar Lal*, for the respondents.

The following judgments were delivered by the Full Bench :—

EDGE, C.J.—It appears to me that the question as to whether this application under s. 622 of the Code of Civil Procedure can be maintained must depend upon the question as to whether the decree to be amended was the decree of the 22nd June, 1878, of the former Subordinate Judge of Aligarh, or the decree of this Court of the 8th February, 1882. If the decree to be amended is the decree of this Court of the 8th February, 1882, it could not, I think, be contended that the Subordinate Judge could have had any jurisdiction to amend or interfere with the decree of this Court, which is the decree of the Court of appeal. Similarly, if the decree to be amended was the decree of this Court, I fail to see what object could have been attained by amending or what jurisdiction the Subordinate Judge had to amend the decree of the Court below, after that decree had been affirmed by a decree of this court. The question as to which of these decrees was the decree to be amended, if any amendment could have been made, must, in my opinion, depend on the further question as to whether the decree of an appellate Court affirming the decree of a Court below is the decree to be amended, or whether in such case the decree to be amended is the

1888      decree of the Court below. This latter question is decided by the judgment of a Full Bench of this Court in *Shohrat Singh v. Bridgman* (1), where it was decided that "the appellate decree is the final decree and the only decree capable of being executed after it has been passed, whether the same reverses, modifies or confirms the decree of the Court from which the appeal was made." The facts of the case before the Full Bench and the question submitted for the opinion of the Full Bench show that by "the appellate decree" the Full Bench meant the ultimate decree, as in that case the decree of this Court, and not the decree of the Court below which had been given by the Subordinate Judge of Gorakhpur in the appeal from the decree of the Munsif of Bansi. The judgment of the Full Bench in that case has been to some extent open to misconception, by reason of a clerical error, by which the word "not" in the last line but one of the reported judgment was allowed to remain. The insertion of the word "not" must have been due to a clerical error. That word being omitted, the judgment is clear and consistent, and is, in any opinion, right in law. It has been contended that that judgment is at variance with the judgment of the Privy Council in *Kristokinkur Roy v. Raja Burrodacaunt Roy* (2). I do not so read the judgment of their Lordships of the Privy Council. At page 491 their Lordships say, "It is clear that, under that Code, whatever decree is executed, is to be executed by the lower Court, in which the record remains, or to which it is to be returned. But ss. 360, 361 and 362, which prescribe the form of the decree of the appellate Court, direct a copy of it to be entered on the register, and treat that decree as a decree to be executed, seem to exclude the notion that it is a mere direction to the lower Court to pass and execute a certain decree."

The sections referred to by their Lordships correspond with ss. 579, 581 and 583 of the present Code of Civil Procedure. Again their Lordships say at page 492, in reference to decrees of affirmance, "Their Lordships may further suggest that in all cases it may be expedient expressly to embody in a decree of affirmance so much

(1) I. L. R., 4 All. 376.

(2) 14 Moo. I. A. 465.

of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree," clearly indicating that in their Lordships' opinion a decree affirmed on appeal is superseded by the decree of affirmance. I fail to see how a decree which has been superseded can be executed. Even apart from authority, it appears to me that the decree to be executed is the decree of the appellate Court, whether that decree reverses, modifies or affirms a decree below. By s. 235 of the Code the application for execution of a decree of a Court of first instance must, amongst other particulars, contain the following :—

- " (c) The date of the decree ;
- " (d) Whether any appeal has been preferred from the decree ;
- " (g) The amount of the debt or compensation with the interest, if any, due upon the decree, or other relief granted thereby ;
- " (h) The amount of costs, if any, awarded."

Some of these particulars in an application made to the Court which first passed the decree would apply only to the decree of that Court, and not to the decree of the appellate Court, and the particular (d) "whether any appeal has been preferred from the decree," presupposes that if any appeal had been preferred, it had not been determined.

S. 579 of the Code amongst other things grants that the decree of an appellate Court "shall specify clearly the relief granted or other determination of the appeal," and further enacts that "the decree shall also state the amount of costs incurred in the appeal, and by what parties and in what proportion such costs and the costs in the suit are to be paid." That section relates to decrees in first appeals, and is by s. 587 made applicable to decrees in second appeals.

It is clear from s. 579 that in any case the decree to be executed not only for the costs of the appeal, but for *the costs of the suit*, is the decree of the appellate Court and of that Court only. In my opinion the effect of s. 579 of the Code is to cause the decree of the

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appellate Court to supersede the decree of the Court below even when the decree of the appellate Court is one which merely affirms that decree below and does not reverse it or modify it. In my opinion the only decree that can be amended is the decree to be executed, and the decree to be executed is the decree of the appellate Court, and not the decree of the Court below. To take a case which might arise if we were to hold otherwise; assume that a decree of a Court of first instance is not in conformity with the judgment of that Court, but such decree has on appeal been affirmed in general terms or by specifically complying with the provisions of s. 579. If in such case the Court of first instance were to alter its decree which had been already affirmed on appeal by bringing it into accordance with its judgment, the result would be that the decrees so amended would not be the decree which had been affirmed on appeal, and might be a decree absolutely at variance with the decree which the appellate Court had made and had decided was the decree which the successful party on appeal was entitled to. If a decree in a case like this can be amended, it must, in my opinion, be for the appellate Court, which can say what was the decree which it intended to make by affirmance or otherwise, and not for the subordinate Court, to amend the decree of the appellate Court. It would, as it appears to me, be useless to amend the decree of the Court below, which was superseded by the decree in appeal. As this application under s. 622 relates to the order of the Court below and is not an application of this Court to amend the decree of this Court of the 8th February, 1882, it is not, I think, necessary to express any opinion as to the judgment of Straight and Tyrrell, JJ., of the 16th August, 1883, or as to the effect of the order of Oldfield, J., of the 8th May, 1884. As I am clearly of opinion for the reasons which I have stated that the Subordinate Judge had no jurisdiction to make the order to which this application refers, it is not, I think, necessary to express any opinion as to the article of the Limitation Act which may govern such applications, or to express any opinion as to whether a Judge who was no party to the making of a decree could amend such decree in the manner desired by the decree-holders in this case.

In my opinion this application should be allowed and the order below set aside. Under the circumstances of this case I think each party should bear their own costs here and below.

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STRAIGHT, J.—I am of the same opinion.

In the view I take of this reference, after having heard the arguments on both sides, the determination of it and the case turns upon the single question, whether the Subordinate Judge had jurisdiction to make the order of the 20th July, 1885. If he had, then the application to this Court under s. 622 of the Code was rightly preferred, and the other points arising, upon which revision is sought, must be considered and decided; if he had not, then there is obviously an end of the matter. It seems to me that the Full Bench ruling of this Court in *Shohrat Singh v. Bridgman* (1) practically concludes that question. It was there held that "the decree of the Court of last instance is the only decree susceptible of execution, and that when the decree of the lower Court with all its specifications is simply affirmed by and adopted in the decree of the last appellate Court, it would then be open to the Court executing such last decree to refer to the decree of the lower Court for information as to its particular contents. But no question of the correctness of the contents could be entertained or given effect to by the executing Court. Objections to the decree of the lower Court which has become that of the last appellate Court could be attended to by the latter Court alone." This is what appears from the body of the judgment, and it is clear that the head-note to the case is erroneous, though this is probably due to the presence of the word "not" in the last sentence of the judgment, which upon the face of it is a mistake, as the context with which it is irreconcilable plainly shows. That this is so is placed beyond doubt by a subsequent judgment of Tyrrell, J., who wrote the Full Bench judgment, and myself also a party to it, in *Behari Lal v. Khub Chand* (2), where we held that the Court executing an appellate decree might execute it for the costs of the original Court, looking to the decree of that Court to ascertain the amount thereof, and Oldfield, J., expressed himself to the same effect in another case

(1) I. L. R., 4 All. 376.

(2) I. L. R., 6 All. 48.



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*Gobardhan Das v. Gopal Ram* (1), though, in my opinion, while rightly interpreting the meaning of the Full Bench ruling, he misapplied it. The question therefore which is before us seems to me to be settled by the Full Bench ruling, and if on no other principle than that of *stare decisis*, we ought, in my opinion, not to reconsider it. But I desire to add that, according to my view, that decision is not only a perfectly sound one, but upon grounds of simplicity and convenience of procedure is unassailable. Much stress was laid in the course of the argument for the respondents on the judgment of their Lordships of the Privy Council (2). It is to be observed that the real point then arising for determination was, whether, under the limitation law then in force, namely, Act XIV of 1859, a period of three or twelve years was applicable to the execution of a decree passed by the High Court in appeal from a District Court, and it was held in accordance with a Full Bench ruling of the Calcutta Court reported in the 16th volume of Sutherland's Weekly Reporter that three years was the period. No doubt their Lordships do make some remarks with regard to a part of that decision of the Full Bench, which held that the decree of a District Court affirmed on appeal by a High Court becomes a decree of the High Court; but with profound respect it seems to me that they can only be regarded as *obiter*, and though I concur in the interpretation placed upon them by the learned Chief Justice and not that of my brother Mahmood, they can, in my opinion, have no bearing on questions arising in reference to the existing limitation law, which expressly provides that where an appeal has been preferred, time runs from the date of the final decree or order of the appellate Court, or to the present Code, by which the procedure of the Courts is now governed. By s. 579 of Act XIV of 1882 it is declared what a decree in appeal shall contain, by s. 581 such decree along with the judgment is to be sent to the Court which passed the decree appealed against, and by s. 583 it is specifically provided that a party desiring to obtain execution of an appellate decree shall apply to the Court which passed the decree appealed against, and "such Court shall proceed to execute the decree passed

(1) I. L. R., 7 ALL., 866.

(2) 14 Moo. I. A., 465.

in appeal according to the rules hereinbefore prescribed for the execution of decree in suits." In this connection I may conveniently refer to the judgment of a Division Bench of the Calcutta Court *Noor Ali Chowdhari v. Koni Meah* (1). It may also be noted that the provisions of the Code relating to appellate decrees are much the same as those which in Chapter XLV deal with the orders of Her Majesty's Council, as to which there can be no doubt that it is Her Majesty's order and nothing else which the Courts in India have to execute, and so a Full Bench of the Calcutta Court has specifically said in *Luchmun Persad Singh v. Kishun Persad Singh* (2). For these reasons not only do I think the Full Bench ruling of this Court, *Shohrat Singh v. Bridgman* (3), binds us, but that it is perfectly good law. Applied to the facts of the present case, the matter therefore stand thus, that the judgment and decree of Stuart, C.J., and Oldfield, J., of the 8th February, 1882, by adopting the judgment and decree of the Subordinate Judge, superseded such judgment and decree, and that it was the decree of this Court only that was capable of execution, assisted so far as was necessary for that purpose by reference to the Subordinate Judge's decree which it incorporated. It follows therefore that the Court and the only Court to which application could be made under s. 206 of the Civil Procedure Code was this Court, and that whatever may be the correctness or the effect of the order of Oldfield, J., on the application of the 6th March, 1884, about which I express no opinion, such application was rightly made to him and he alone had jurisdiction to deal with the matter. I regret that this view should be at variance with that expressed by my brother Mahmood in *Ram Saran v. Persidhar Rai* (4), but it seems to me to be the necessary consequence of the Full Bench ruling of this Court, and is in accordance with the opinion expressed by Couch, C.J., no doubt when Act VIII of 1859 was in force, in *Onraet v. Sankar Dutt Singh* (5), and of my brother Mahmood himself at one time in *Tarsi Ram v. Man Singh* (6). The only other

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(1) I. L. R. 18 Calc., 18.

(4) I. L. R., 16 All., 51.

(2) I. L. R., 8 Calc., 218.

(5) 5 B. L. R., App., 60.

(3) I. L. R., 4 All., 376.

(6) I. L. R., 8 All., 492.

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authority to the contrary is a ruling of Collins, C.J., and Muthusami Ayyar, J., in *Sundara v. Subbanna* (1); but as no reasons are given for that decision, and as no argument was addressed to those learned Judges in support of the Munsif's order in that case, I am unable to accept it as a safe guide. I am of opinion that the preliminary objection of the petitioner for revision to the jurisdiction of the Subordinate Judge to make the order of the 20th July, 1885, must prevail, and that this petition being allowed, such order must be set aside. Looking, however, to all the circumstances, I think the parties should pay their own costs in all Courts.

MAHMOOD, J.—The facts of the case and the points of law which arise from those facts are so clearly stated in the order of reference that I need not repeat them, and I shall express my views upon the points of law in the order in which they have been stated. But before doing so, I may premise that the Full Bench rulings of this Court in *Surta v. Ganga* (2) and *Raghunath Das v. Rajkumar* (3), which approved of my judgments in those same cases (4), when they were disposed of by Mr. Justice Oldfield and myself in two dissentient judgments, leave no doubt that the order of the learned Subordinate Judge, dated 20th July, 1885, having been passed for amending a decree under s. 206 of the Code of Civil Procedure, amounts to a separate adjudication and as such might be made the subject of revision under s. 622 of the Code of Civil Procedure.

This being so, the first question referred to the Full Bench is, "when the decree of a subordinate Court has been confirmed or modified in appeal, what Court has jurisdiction to entertain an application for amendment under s. 206 of the Civil Procedure Code?"

In considering the question I cannot help feeling that the first step of reasoning is the rule unanimously laid down by a Full Bench of this Court in *Sohrat Singh v. Bridgman* (5). The head-note

(1) I. L. R., 9 Mad., 354.

(3) I. L. R., 7 All., 876.

(2) I. L. R., 7 All., 875.

(4) I. L. R., 7 All., 276, 411.

(5) I. L. R., 4 All., 376.

of that ruling, as appears in the report of the case, represent that this Court unanimously held "that the decree of the Court of last instance is the only decree susceptible of execution, and the specification of the decrees of the lower Court or Courts as such may not be referred to and applied by the Court executing such decree."

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This head-note is a reproduction *verbatim* of the last sentence of my brother Tyrrell's judgment in that case, which the rest of the Court adopted. It was principally in consequence of the existence of the word "not" in that sentence that in delivering my judgment in *Gobardhan Das v. Gopal Ram* (1), I stated that I had on several occasions sitting as the Judge in Oudh declined to follow that ruling. But in the course of hearing this case, the learned Chief Justice, having sent for the original record of the judgment, has come to the conclusion that the word "not" which occurs in the last sentence of the judgment, was due to a *lapsus calami*, because it would render the sentence inconsistent with an earlier passage in the same judgment. In this view I understand my brother Straight, who was a party to the Full Bench ruling, concurs; and I am also very glad to adopt the same explanation because it materially reduces the rigour of the ruling as represented in the head-note. Reading the ruling then, omitting the word "not," I understand it to hold "that the decree of the Court of last instance is the only decree susceptible of execution, and that the specifications of the decrees of the lower Court or Courts as such may be referred to and applied by the Court executing the decree." This interpretation of the Full Bench ruling is in full accord with the explanation of that judgment by Oldfield, J., in *Gobardhan Das v. Gopal Ram* (1), where that learned Judge distinctly stated that the Full Bench ruling was not intended to go beyond the ruling of their Lordships of the Privy Council in *Kristokinkur Roy v. Rajah Burrodacant Roy* (2). I had in that case the honour of being associated with Oldfield, J., and willingly concurred in his explanation, because it went the length of permitting what was actually done in that case, namely, that when the first Court's decree had been simply affirmed by the High Court as the Court of last instance, the

(1) I. L. R., 7 All, 366, p. 370. (2) 4 Moo., I. A., 465.

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decree-holder was allowed to execute the decree of the Court of first instance, which decree had in no manner been altered either by the lower appellate Court or by this Court.

I have no desire to re-open the question settled by the Full Bench ruling in *Shohrat Singh v. Bridgman* (1) as now explained. Nor do I think it necessary, for the purpose of this case, to enter into the broad question, how far the Full Bench ruling would affect the question of amendment of a decree which has been either *reversed or modified* by a Court of appeal. In this case, the decree of the Subordinate Judge was *simply affirmed* by this Court, and the question as to the power of amendment is therefore limited to the case of a decree which has been affirmed.

Dealing with the question in this strictly limited form, I am of opinion that the rule laid down by Oldfield, J., in *Gebardhan Das v. Gopal Ram* (2) with my concurrence, represents the correct view of the law. That view is in full accord with the observations made by the Lords of the Privy Council in *Kristokinkur Roy v. Rajah Burrodacaunt Roy* (3). Those observations may be quoted by me here because I shall presently rely upon them for the view of the law which I have taken in this case. Their Lordships, after referring to the state of the case-law as represented by *Chowdhry Wahid Ali v. Mullick Inayat Ali* (4), *Arunachella Thudayan v. Veludayan* (5), and a Full Bench ruling of the Calcutta High Court in *Ram Charan Bysak v. Lakhi Kant Bannik* (6), went on to say:—"The function of an appellate Court is to determine what decree the Court below ought to have made. It may affirm, reverse or vary the decree under appeal. In the first case, *it leaves the original decree standing*, superadding, it may be, an order for the payment of the costs of the appeal, or for the interest on the amount originally decreed. In the other two cases *it substitutes* other relief for the relief originally given. In all these cases the decree of the appellate Court may be regarded either as a direction to the lower Court to make and execute a decree of its own accordingly, or as an independent decree,

(1) I. L. R., 4 All., 876.  
 (2) I. L. R., 7 All., 366.  
 (3) 14 Moo. I. A., 465.

(4) 6 B. L. R., 52.  
 (5) 5 Mad. H. C. Rep., 215.  
 (6) 7 B. L. R., 704.

whether it is to be executed by the appellate Court or by the lower Court. In the latter case a further question arises, namely, whether the original decree, if wholly affirmed (or so much of it as has been affirmed, if it has been partially affirmed), is to be treated as merged or incorporated in the decree of the appellate Court as the sole decree capable of execution, or whether both decrees should be treated as standing, execution being had on each in respect of what is enjoined by the one, and not expressly enjoined by the other."

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Having thus explained the general principles applicable to such questions, their Lordships referred to the law and practice of English tribunals, and then, after considering the provisions of the old Code of Civil Procedure (Act VIII of 1859) and referring to the effect of the Calcutta and Madras rulings, made the following observations :—

"If the question were *res integra*, their Lordships would incline to the view taken by the Judges of the High Court in the present case, namely, *that the execution ought to proceed on a decree of which the mandatory part expressly declares the right sought to be enforced*. Considering, however, that for the reasons already given *the question is not of much practical importance*, their Lordships will not express dissent from the rulings of the Madras Court, and of the Full Bench of the Bengal Court, further than by saying that there may be cases in which the appellate Court, particularly on special appeal, might see good reasons to limit its decision to a simple dismissal of the appeal, and to abstain from confirming a decree erroneous or questionable, yet not open to examination by reason of the special and limited nature of the appeal. Their Lordships may further suggest that in all cases it may be expedient, expressly to embody in a decree of affirmance so much of the decree below as it is intended to affirm, and thus avoid the necessity of a reference to the superseded decree."

Now, in the first place I am of opinion that the passages which I have quoted from the judgment of the Lords of the Privy Council are not to be regarded as mere *obiter dicta*, because those passages

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form an essential part of the *ratio decidendi* upon which their Lordships' judgment proceeded. In the second place, I hold that their effect is to modify the views expressed by Mitter, J., in the Calcutta Full Bench case, and by Scotland, C.J., in the Madras case, both of which have already been cited. In the third place, their Lordships drew a clear distinction between a decree which has simply been *affirmed* in appeal and a decree which has either been *reversed* or *modified* by the appellate Court.

Such distinction is to my mind clearly borne out by clause (d) of s. 574, which, whilst requiring that the judgment of the appellate Court should specify "the relief to which the appellant is entitled," limits the direction to cases in which "the decree appealed against is *reversed* or *varied*," and says nothing as to cases in which the appellate Court *simply affirms* the lower Court's decree. The same distinction is apparent from the second paragraph of s. 579, which directs that the appellate decree "shall specify clearly the relief granted or other determination of the appeal," but says nothing as to cases in which no relief is granted to the appellant by such appellate decree, and the only "*determination*" of the appeal amounts to saying that the appeal should never have been preferred. The section certainly does not require that in such cases the appellate decree should supersede the first Court's decree so as to render that decree ineffective for purposes of execution. On the contrary, the provisions of s. 583, which relate to the execution of the decrees of the appellate Court, distinctly imply that the appellate Court's decree, when it *simply affirms* the first Court's decree, is to be distinguished from cases in which the first Court's decree has been interfered with. I say this, because the section limits the execution of the appellate Court's decree to cases in which a party is "entitled to any benefit by way of restitution or otherwise under a decree passed in appeal." It follows that where, as in this case, the original decree was simply affirmed even without any order as to costs of the appeal which was dismissed, s. 583 of the Code would have no application, because no question of restitution or any other benefit would arise out of the appellate Court's decree.

and the mandatory part of the original decree which has not been interfered with at all would stand though the fact of the ineffective appeal would have to be mentioned as required by clause (d) of s. 235 of the Code of Civil Procedure. In such cases, at least, the *dictum* of the Lords of the Privy Council which I have quoted would apply, because, to use their Lordships' words, "*the question is not of much practical importance*," by which sentence I understand that in such a case as this, it does not matter very much whether the original decree or the decree of the appellate Court is put into execution, so long as the decree which contains the *mandatory* order granting the relief is the decree which is sought to be enforced, whether as a decree in itself or as a decree incorporated in the appellate Court's decree of affirmance.

The matter therefore stands thus: that according to the Privy Council ruling, as also the Full Bench ruling of this Court as explained by Oldfield, J., in the case of *Gobardhan Das* and as now understood by us, the decree of the first Court when affirmed by the appellate Court's decree may be referred to in executing the appellate decree.

In the present case the first Court's decree was passed on the 22nd June, 1878, and it was simply confirmed in appeal by Stuart, C.J., and Oldfield, J., on the 8th February, 1882, there being then no objection that the first Court's decree was incapable of execution by reason of its omitting to specify the shares or the *mauzas* decreed in favour of the plaintiffs. The objection that the decree was incapable of execution was taken for the first time when the decree was sought to be executed, and those objections having been disallowed by the first Court, my brethren Straight and Tyrrell, on the 16th August, 1883, held in appeal that the decree was incapable of execution by reason of the want of specification above mentioned. The case is reported at page 30 of the Indian Law Reports, Vol. 6, Allahabad Series, and the judgment in that case ends by saying that "the proper and only course open to the decree-holders was to procure the remedy of these defects according to law."

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The decree-holders accordingly made an application to this Court on the 6th March, 1884, praying that this Court's decree of affirmance, dated the 8th February, 1882, might be so amended, under s. 206 of the Code of Civil Procedure, as to render it capable of execution. In other words, the decree-holders prayed that the defects which were pointed out by Straight and Tyrrell, JJ., in their judgment of the 16th August, 1883, (1) might be remedied as those learned Judges had suggested. The application was probably made to this Court in consequence of the Full Bench ruling in *Shohrat Singh v. Bridgman* (2), for otherwise the application would naturally have been made to the Court of first instance, since the decree of this Court was simply a decree of affirmance. The application came on for hearing before Oldfield, J., and it was probably in consequence of the literal interpretation which that learned Judge placed on the Full Bench ruling in *Shohrat Singh's* case that he rejected the application on the 18th May, 1884, by simply saying "there is no case made out for correcting the decree of this Court which is correct."

It is not for me to doubt the accuracy either of the ruling of my brethren Straight and Tyrrell, dated the 6th August, 1883 (1), or of the order of Oldfield, J., which I have first quoted. Both these judgments must be read in the light of the Full Bench ruling in the case of *Shohrat Singh*, and so read, I confess I find it difficult to reconcile them. The one judgment holds that the decree was vague and required amendment: the other judgment says that the decree needed no such amendment and was correct.

It is easy to conceive how these unfortunate decree-holders, finding themselves in this predicament, entertained the hope of obtaining the enforcement of the decree which they had obtained by resorting to a third method. They accordingly went on the 6th February, 1885, to the first Court with an application praying that Court to render its decree intelligible and capable of execution by amending it under the provisions of s. 206 of the Civil Procedure Code. That Court has granted the application and amended the

(1) I. L. R., 6 All., 30.

(2) I. L. R., 4 All., 376.

decree by its order of the 20th July 1885, which is the subject of this application for revision.

The object of the application for revision is to render the first Court's decree of the 22nd June 1878, and this Court's decree of the 8th February 1882, wholly nugatory; and it has been contended that, under the circumstances of this case, the law requires us to render futile the effects of two solemn adjudications whereby the decree-holders were decreed their shares of inheritance under the Muhammadan Law in ancestral property.

Does the law require us to accede to such a request? As to the justice of the case upon the merits, there is absolutely no doubt, and the only question is, whether the technicalities of our law are such as constrain us to accede to the request. The learned Pandit who appeared in support of this application has frankly accepted this position in the able argument which he addressed to us, and has reminded us of the well known adage that hard cases often make bad law. I have to consider whether the justice of this case does require us to make bad law.

I must confess at once that I do not regard the question raised here as intrinsically difficult, and respectfully say that if any complications and difficulties have arisen, they are due to the unsatisfactory condition of the provisions of the last paragraph of s. 206 of the Civil Procedure Code (Act XIV of 1882) and to the orders which have already been passed in this case by this Court. Indeed, this case furnishes a very good illustration of the complications and difficulties which I pointed out in *Tarsi Ram v Man Singh* (1) as arising out of the provisions of that section. In making my observations there, I went on to say: "If a decree has already become the subject of appeal, I do not think the first Court should amend it under s. 206; for the full Bench of this Court in *Shohrat Singh v. Bridgman* (2) has held that the decree of the appellate Court is the only decree susceptible of execution, and the specifications of the decrees of the lower Courts, as such, may not be referred to and applied by the Court executing such decree."

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(1) I. L. R., 8 All., 492, p. 494.

(2) I. L. R., 4 All., 376.

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I have quoted this passage in order to point out that the suggestion therein contained proceeds entirely upon the interpretation of the Full Bench ruling as represented by the head-note and the last sentence in the judgment in which the word "*not*" occurs, which word according to our present interpretation must be omitted, as I have already stated. This being so, it follows that I should have not given expression to that *dictum*. If I had understood the Full Bench ruling at that time in the manner in which it is now interpreted, and that that *dictum* is no authority against the view which I now hold on the first question in the case.

I am of opinion that when the decree of a subordinate Court has been simply confirmed, as in this case, the subordinate Court continues to have jurisdiction to entertain an application for amendment of its own decree under s. 206 of the Civil Procedure Code. This view is supported by the ruling of the Madras High Court in *Sundara v. Subbana* (1) and by the unreported ruling of this Court in *Mohan Lal v. Lachmi Prasad*, (Misc. No. 213 of 1886, decided on the 22nd December 1886), in which Oldfield and Brodhurst, JJ., after formulating the exact question as to the power of amendment by the first Court when the decree has been *affirmed*, went on to say, "we know of no reason why the Court has not such a power," and they concurred in following the Madras ruling. Both these rulings were considered by me in *Ram Saran v. Persidhar Rai* (2), and I followed them for reasons which I therein stated, and still adhere to. It is clear from these cases that the Madras Court, as also this Court, so far as the case-law stands, is agreed in holding that a decree which has been *affirmed* by an appellate Court may be amended by the Court which passed the original decree. There is, however, an old ruling of Couch, C.J., and Kemp, J., in *Onraet v. Sankar Dutt Singh* (3), where Couch, C.J., as Chief Justice of the Calcutta High Court, followed an earlier ruling of his own in *Bhanushankar Gopal Ram v. Baghunath Ram Mangal Ram* (4), which was given when he was puisne Judge of the Bombay High

(1) I. L. R., 9 Mad., 354.

(2) I. L. R., 10 All., 51.

(3) 5 B. L. R., 60 App.

(4) 2 Bom. H. C. Rep., 101 A. C.

Court. The effect of these two rulings is to lay down the broad rule that, after a decree has been confirmed on appeal, the subordinate Court has no power of making any alteration in it. I have respectfully considered both these rulings, and I think, for the purposes of this case, it is enough to say that they were passed under the old Civil Procedure Code (Act VIII of 1859) of which s. 189, which corresponds to s. 206 of the present Code, contained no such power as to amendment of decrees as the last paragraph of the latter section contemplates; that these rulings were given before the observations made by the Lords of Privy Council in *Kristokinkur Roy v. Rajah Burrodacaunt Roy* (1), and that, therefore, those rulings cannot govern the interpretation of the second paragraph of s. 206 of the present Code which did not then exist in the statute book but with which we are concerned in this case. And I may add, before proceeding further, that not a single ruling has been cited at the Bar which would contradict the view of the second paragraph of s. 206 taken by Collins, C.J., and Muthusami Ayyar, J., in Madras, and by Oldfield and Brodhurst, JJ., and myself here in the cases which I have already referred to.

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Such then is the state of the case-law upon the subject of the amendment of decree by the Court which passed it, after such decree has been *affirmed* by a Court of appeal, and if the matter rested entirely upon the case-law since the enactment of the last paragraph of s. 206 of the Code, I should have considered it unnecessary to deal with the subject any further. But since serious doubts have been suggested in the course of the argument, I must proceed to consider the question more fully than I did in *Ram Saran v. Persidhar Rai* (2), especially as that case was disposed of by me sitting as a single Judge and without the advantage of conferring with any of my brother Judges.

Now, I take it as an undoubted principle of law that everything is to be taken as permissible unless there is some prohibition against it. The principle is of such a comprehensive nature that it applies equally to substantive and adjective law, and has been recognised

(1) 14 Moo. I. A., 465.

(2) I. L. R., 10 All., 51.

1888 as one of the fundamental principles of interpreting statutes. It is, indeed, true that in interpreting consolidatory statutes, such as the preamble of our Civil Procedure Code represents that enactment to be, we must consult the statute itself in order to find authority or prohibition.

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If I am right so far, where is the authority or prohibition in that Code for holding that the jurisdiction which a Court passing a decree undoubtedly possessed to amend that decree, under the last paragraph of s. 206 of the Code, is taken away from that Court by the simple fact of an appeal having been preferred from that decree? Clearly no such express provision exists in the Code. On the contrary, there are indications in the very opening sentence of s. 545 of that Code to show that the mere fact of an appeal having been preferred from a decree shall be no reason for staying the execution of that decree. Let us suppose then, in the first place, that a decree is amended before it has been appealed from. In such a case I should have no hesitation in holding that the Court passing the decree could amend the decree, for any other view would necessitate the conclusion that the last paragraph of s. 206 need not have been enacted at all. Let us then, in the next place, suppose a case in which an appeal has already been preferred from the decree, but the appeal is *still pending*. In such a case, where is the authority in the Code to justify the view that the power and jurisdiction to amend the decree has come to an end by the mere fact of the appeal having been filed? I am not aware of any provision of the Code to warrant our holding that the pendency of an appeal operates as extinguishing the lower Court's power of amending its own decree under s. 206 of the Code. No principle such as the doctrine of *lis pendens* would, of course, apply to such a matter, for the matter is one of procedure and must be governed by the provisions of the Code.

Then comes the third stage, which relates to the immediate question now before us, namely, whether there is any authority in the Code to warrant the conclusion that when a decree has been *affirmed* in appeal (and I limit the points to cases in which the decree has been upheld, excluding those in which the decree has been interfered

with by the Appellate Court), the Court of first instance ceases to possess the power of amending its own decree, which power up to the moment of the disposal of the appeal it undoubtedly possessed. It has been contended that the Full Bench ruling in *Shohrat Singh's* case necessitates the conclusion that the power of amendment does so come to an end. But as that ruling has now been explained, it permits, at least in cases where the original decree is *affirmed* in appeal, reference to such decree. And if this is so, it seems to me that the decree which requires reference is the decree which would be in accord with the judgment of which it is the result and not a decree which on the face of it contains clerical or arithmetical errors, or is obviously at variance with the judgment that it contains such defects as can be properly removed by amendment under s. 206 of the Code.

It is perfectly true that a clerical or arithmetical error or any matter in the decree at variance with the judgment may be rectified by the Court of appeal, but in such a case I should not regard the decree of the Appellate Court to be a decree of *simple affirmance*, but one of modification and different considerations, which I do not intend to discuss here, would be applicable. But where the appellate decree simply *affirms* the original decree, which decree may be referred to in executing the appellate decree, I see no reason why such original decree should not be brought into accord with the judgment of which it is the result. It may, indeed, be, as has been suggested in the course of the argument, that the original Court, by amending its decree, may make that decree different to what was intended to be upheld by the Appellate Court. But such a course would be an improper exercise of jurisdiction under s. 206 of the Code, and as such would form a fit subject of interference in revision by this Court. In other words, a clear remedy exists for an improper exercise of the power of amending decrees, and it seems to me that there is no force in the argument that because such power may be improperly exercised in some cases, therefore, even in cases where such power has been *properly* exercised, the amendment of the decree is to be dealt with as a *nullity*, although it brought the

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decree in full accord with the judgment, and although the amended decree represents the proper decree which the Appellate Court upheld. In such cases I am of opinion that the proper Court to which an application for amendment of the decree under s. 206 of the Civil Procedure Code should be made is the Court which passed the decree "of which the mandatory part expressly declares the right sought to be enforced," and that, in a case such as this, where the original decree was simply *affirmed* in appeal, the Subordinate Judge's Court had jurisdiction to entertain the application for amendment.

This, then, is my answer to the first question as propounded in the order of reference, and it may be illustrated by cases in which an appeal is dismissed in default or barred by limitation.

The second question as stated in that order is, "What, if any, article of the Limitation Act governs applications for amendment of decrees under s. 206 of Civil Procedure Code?" This question is the subject of a Division Bench ruling of this Court in *Gaya Prasad v. Sikri Prasad* (1), in which it was held, for reasons which do not appear in the report of the case, that the general provisions of art. 178 of the Limitation Act (XV of 1877), prescribing a period of three years' limitation, applied to such applications. In delivering my judgment in *Raghunath Dass v. Rajkumar* (2), I expressed my dissent from that ruling by saying—

"The Limitation Act relates to the action of parties, but not to the action of the Court. If the Court should be of opinion that by reason of any clerical or arithmetical error, its decree does not carry the judgment into complete effect, it may take up the decree and amend it even after three years or more. Under the provisions of the law as to revision, a decree cannot be revised if an appeal from it is possible. By s. 206, as I understand it, the Court has power to amend its decree, even if an appeal would lie therefrom to this Court or to their Lordships of the Privy Council, and the time for the appeal had expired."

(1) I.L.R., 4 All., 28.

(2) I. L. R., 7 All., 276.

Again, I expressed my dissent from that ruling in delivering my judgment in *Tarsi Ram v. Man Singh* (1), though in the latter case my views form part of *obiter dicta*. I, however, referred to the authority of the principle on which the rulings of the other High Courts in *Robarts v. Harrison* (2), *Kylasa Geundan v. Ramasami Ayyan* (3), and *Vithal Janardan v. Vithojirao Putlajirao* (4), proceed (5). I still adhere to the same opinion, and hold that a vast distinction exists between cases in which a Court of its own motion takes any particular action or is enjoined by law to take such action, and cases where that Court possesses no such power without an application being made by a party. The reason is that in such cases it is, *ex necessitate rei*, impossible to decide when a Court takes action of its own accord and when it acts on the application of a party. The Madras and Bombay cases to which I have referred relate to the grant of sale-certificates to the auction-purchaser, and those Courts have held that because it is the duty of the Court to grant such certificates, the mere fact of an application being made for obtaining such certificate would not be governed by the limitation law. I may perhaps also employ the illustration of an application made by a decree-holder to obtain the money held in deposit for him by the Court.

The same principle applies to cases in which the Court is required to take action, *suo motu*, such as amending decrees under s. 206 of the Code of Civil Procedure. There is, of course, no period provided by the limitation law for the exercise of such power by the Court of its own motion, and it would be introducing an anomaly to hold that what a Court may do of its own motion without any limitation of time, cannot be done by that Court when asked to do so by an application reminding the Court to do that which it should have done of its own motion. My answer to the second question, therefore, is that no period of limitation, and no article of the Limitation Act (XV of 1877) is applicable to such applications or mo-

(1) I.L.R., 8 All., 492.

(2) I.L.R., 7 Calc., 333.

(3) I.L.R., 4 Mad., 172.

(4) I.L.R., 6 Bom., 586.

(5) See also *Darbo v. Kesko Rai* (I. L. R., 9 All. 364), *Shicapa v. Shivpanch Lingapa* (I.L.R., 11 Bom., 284) and *Jiv-raj v. Pragji* (I.L.R., 10 Mad., 51.)

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tions as s. 206 of the Civil Procedure Code contemplates. I may repeat here what I have more than once said before, that, judging by the preamble of that Act, it is not to be regarded as a consolidatory enactment so far as "*applications*" are concerned, because the preamble mentions only "*certain applications*," and not all classes of applications.

Upon the third question as enunciated in the order of reference, I am of opinion that the order of Oldfield, J., dated the 8th May 1884, which might have been appealed from under s. 10 of our Letters Patent, not having been so appealed, has become final and concludes the parties from praying for the same relief, that is, seeking amendment of the decree of this Court, which was declared by that order to be "*correct*." The matter is therefore *res judicata* and cannot be interfered with by us in this case. But whilst I hold this, I am of opinion that that order benefits the case of the decree-holders-respondents; because it precludes us from holding that the decree of this Court, which the decree-holders unsuccessfully sought to amend, is in need of any amendment or is incapable of execution. The decree was simply a decree of affirmance and contained no mandatory part expressly declaring the right sought to be enforced, and Oldfield, J., no doubt, therefore, thought that, since the decree gave full effect to the judgment of this Court, it was a sufficiently accurate decree so long as it dismissed the appeal with which it dealt.

Having so far dealt with the specific questions enunciated in the order of reference, I will deal briefly with the remaining part of the argument addressed by the learned Pandit in support of the application for revision. I understood the learned pleader to argue that because in s. 624 of the Code reference is made to "*some clerical error apparent on the face of the decree*," and such clerical error is also mentioned in s. 206, therefore the application for amendment granted by the Subordinate Judge must be taken to be an application for review of judgment, such as could not be entertained by a Judge other than the one who passed the original decree, and that, therefore, the order of the Subordinate Judge must be set aside in

revision. Now, in the first place, if the argument is to be accepted, this application for revision, which has been made under s. 622, would require dismissal, because under the second paragraph of s. 629 an appeal would lie to this Court, and no such application for revision could therefore be made. In the next place, I think Mr. *Dwarka Nath Banerji* was right in his contention that there is no rule of law relating to the interpretation of statutes, or even to the rules of common law, which lays down that, where more than one remedy for the same purpose is provided, the person entitled to such remedy is restricted to any particular mode, or that any particular remedy bars the other remedies. I have already said that clerical or arithmetical errors may be corrected by a Court of appeal, and I hold the same view as to review of judgment. But so long as the errors fall within the purview of s. 206, I cannot hold that that section is not available to a party simply because the errors of which he complains might also have been rectified by appeal or review of judgment. The application to the Subordinate Judge in this case was clearly an application under s. 206 of the Code, and, therefore, although the learned Subordinate Judge who passed the order now under consideration was not the same as the one who passed the original decree, I hold that the prohibition contained in s. 624 has no application to the case.

I think I have now dealt with all the arguments in the case which were addressed to us at the Bar. But in support of the general effect of the view of the law which I have taken, I wish to refer to the bearing which the maxim *ubi jus ibi remedium* has upon this case. That maxim represents such a fundamental principle of jurisprudence that it is not limited to *ante litem motam*, but applies equally to rights which have been decreed by competent adjudication. This being so, it seems to me that it would be simply nullifying the decrees of the first Court and of this Court, which decreed the decree-holders' claim, if we were to hold that, although those decrees are standing mandates of judicial tribunals, yet those standing mandates are futile and cannot enable the decree-holders to obtain that which was decreed to them as their inheritance in their

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ancestral estate. In other words, to hold that those decrees, even under the singular circumstances of this case, are incapable of execution, would amount to saying that the doors of the Courts of justice in British India are open to litigants, yet the decrees obtained by them, though confirmed by the highest tribunal in the land, may end in *nothing*, not on account of any fault or negligence on the part of the decree-holders, but on account of the manner in which these decrees are dealt with by the very tribunals which have passed them. And I fully approve the observations of the learned Subordinate Judge when, referring to the technical defects of the plaint in the original litigation, he said : — “ All the proceedings that took place in the case, the whole trial and the decision, cannot now be set aside on account of that defect now pointed out by the defendants for the first time. Those proceedings were legal and proper notwithstanding that defect. To hold them nul and void on account of that defect would be a denial of justice to the plaintiffs.” It may be true, as the learned Pandit said, that hard cases make bad law, but I hope that it is equally true that the technicalities of law are not to be so employed as to override the obvious ends of justice, and instead of being ancillary to such ends, defeat them.

Upon the merits of the amendment made by the learned Subordinate Judge no argument has been pressed upon us, beyond the suggestion that since the decree did not specify the shares and villages which were decreed to the decree-holders, therefore the amendment which furnished such specification in the decree was improperly made. It has not been contended that the properties now specified in the decree by dint of the amendment are properties other than those which were actually (that is, *as a matter of fact*), the properties which formed the subject of litigation in the first Court, such properties being clearly specified in the list attached to the plaint. Nor is it doubted that the decree of the first Court in decreeing the claim referred to those properties, and that the subject-matter of the appeal in this Court also consisted of those properties. This, indeed, is an obvious inference from the fact that

the judgment-debtors themselves never took any objection as to the vagueness of the decree-holders' plaint, or of the decree in the regular litigation, either in the Court of the Subordinate Judge or on appeal in this Court.

What other objection can there be to the amendment made by the Subordinate Judge? *Certum est quod certum reddi potest*, and in this case the application of the maxim creates no difficulty, because the record of the case clearly shows what the actual properties were to which the litigation, which ended in the decree of the first Court and the affirmance of that decree by this Court, related.

The case is thus, so far, on all fours with my ruling in *Ram Saran v. Persidhar Rai* (1), and following the same view here, I hold that there was no want of jurisdiction in the Subordinate Judge who amended the decree, and that such amendment was not open to the objection of illegality or material irregularity, and, having caused no injustice, is not open to interference in revision under s. 622 of the Civil Procedure Code. This view is in accord with the Privy Council ruling in *Amir Hasan Khan v. Sheo Baksh Singh* (2) and with the Full Bench rulings of this Court in *Magni Ram v. Jiwa Lal* (3) and *Badami Kuar v. Dinu Rai* (4), and is consistent even with my explanation of those rulings and others in the judgment which I delivered in *Dhan Singh v. Basant Singh* (5), which only adopted the views which I had before expressed in *Har Prasad v. Jafar Ali* (6).

For these reasons the learned Subordinate Judge's order of the 20th July 1885, now under consideration, is subject to no objection of want of jurisdiction or any illegality or material irregularity, such as s. 622 of the Code contemplates, and since, as I have already said, the order far from having caused an injustice, has done justice to the rights of the decree-holders-respondents, I hold that the discretionary powers of interference conferred upon us by s. 622 of

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(1) I.L.R., 10 All., 51.

(2) I.L.R., 11 Calc., 6.

(3) I.L.R., 7 All., 336.

(4) I.L.R., 8 All., 111.

(5) I.L.R., 8 All., 519.

(6) I.L.R., 7 All., 345.

1888 the Code of Civil Procedure should not be so exercised in this case  
 as to interfere with the order of the learned Subordinate Judge.  
 I would dismiss this application with costs.

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 SULAIMAN  
 KHAN

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 YAB KHAN.

## APPELLATE CIVIL.

*Before Mr. Justice Straight and Mr. Justice Mahmood.*

1888  
 November 26.

GANPAT RAO (DEFENDANT) v. RAM CHANDAR (PLAINTIFF).\*

*Hindu Law—Joint Hindu family—Maintenance—Gift to widow by member of joint family—Construction—Gift presumed to be of life-estate only.*

Disputes having arisen between the sole surviving member of a joint Hindu family and his brother's widow, an amicable arrangement was come to, and certain deeds were executed by both parties, under which the widow was placed in possession of a certain house. On the part of the brother-in-law it was recited that, with a view to permanently settling the matters in dispute, he had received in cash from the widow the value of his share in the house, that she had been put in possession of the house and was in sole proprietary possession thereof, and that he had no connection whatever with it. Subsequently, the widow executed a deed-of-gift purporting to convey to the donee an absolute proprietary title to the house. After her death, the brother-in-law brought a suit against the donee to recover possession of the house, on the ground that the deed-of-gift could not convey to him more than the life-interest of the widow donor.

*Held* that the deed-of-gift must be construed with reference to the nature of the general rights of the donor at the time of execution, as a Hindu widow in a joint Hindu family, entitled only to maintenance. *Sreemutty Robutty Dossee v. Sibchander Mulliek* (1) and *Dinonath Mukerji v. Gopal Churn Mukerji* (2), referred to.

*Held* also, having regard to the rules of the Hindu law regarding the possession by widows of joint family property in lieu of maintenance, and to the experience of the Courts in connection with such matters, that it was for the donee to establish clearly and specifically that the donor, at the time when she executed the deed-of-gift, had any such absolute right of ownership as would entitle her to alienate the property for any interest beyond a life-estate.

*Held* further, that there was nothing in the deeds under which the donor obtained possession of the property, which placed beyond doubt the intention of the parties that she should be entitled to the absolute ownership of the property; and that her estate therefore could at best be regarded as a life-estate, and the deed-of-gift as binding upon the plaintiff during her lifetime, but not further.

\* First Appeal No. 3 of 1887 from a decree of Babu Mirtunjoy Mukerji, Subordinate Judge of Benares, dated the 13th December 1886.

(1) 6 Moo. I. A., 1.

(2) 8 Calc. L. R., 57.

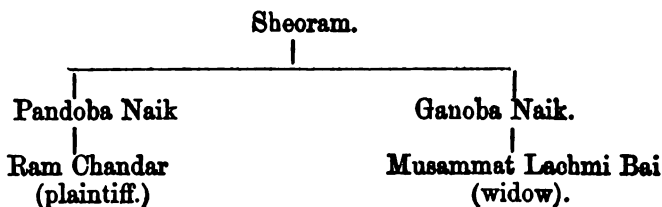
THE facts of this case are sufficiently stated in the judgment of Mahmood, J.

Munshi *Madho Prosad*, for the appellant.

Munshi *Juala Prasad*, for the respondent.

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GANPAT RAO  
v.  
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CHANDAR.

MAHMOOD, J.—This is a first appeal from the decree of the learned Subordinate Judge of Benares, and in order to explain the facts which require determination in the case, it is convenient to bear in mind the following genealogical table:—



Sheoram died many years ago, leaving Ganoba and Pandoba, the sons above-mentioned. Pandoba died about 1849, leaving his son Ram Chandar, and thereafter Ganoba also died about the year 1852, leaving a childless widow Musammat Lachmi Bai, whose name appears in the pedigree.

It is admitted in the case by the parties that the family of Sheoram and his sons was a joint Hindu family, both in point of worship and food and also of residence and estate, so that upon the death of Sheoram his two sons would be the joint co-parceners of the joint family property, and upon the death of Pandoba in 1849 the remaining two members, Ganoba and Ram Chandar, the present plaintiff, would be the members of the joint co-parcenary.

It appears, however, that upon the death of Ganoba, Ram Chandar, plaintiff, claiming to be the sole surviving heir to the property of the joint Hindu family, took steps to assume the management and exercise the proprietary functions in respect of the entire family property, and this led to a complaint by Musammat Lachmi Bai, the widow of Ganoba above-mentioned. The complaint was preferred in the criminal Court on the 7th October 1854, by the widow lady, in which she complained of various acts of the

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plaintiff Ram Chandar and prayed for the interference of the Court under the provisions of Act IV of 1840, which then related to such disputes as to possessory titles. The matter, however, does not appear to have gone further in the Court. We find, as is admitted in the present case, that an amicable arrangement was come to by the parties, and they, in the first place, executed two deeds, one called the deed of arrangement or *ikrarnama* executed by Ram Chandar on the 31st October 1854, and another executed by the same person on the same date called a deed of partition. On the same date a third deed was also executed both by the lady, Musammat Lachmi Bai, and the present plaintiff, Ram Chandar, in the form of a deed of compromise, which was filed in Court and verified, and in which, after referring to the other two deeds, the parties stated the conditions upon which they had arrived at an amicable settlement, and effect was given to the compromise by the Court's order of that date, whereby it was decided that the compromise be accepted and the case be struck off the file.

Matters stood thus when, under the compromise, the lady, Musammat Lachmi Bai, was placed in the possession of the house now in dispute, namely, the house which, in the deed of partition and also in the other deeds of the 31st October 1854, is described as the *haveli* situate in mohalla Dudh Binayak, and similarly under the conditions of the other deeds the plaintiff was placed in possession of another *haveli* or house situate in mohalla Gobindji Naik. This arrangement is best represented in the words of the deed of partition executed by the plaintiff Ram Chandar. It goes on to say:—

“With reference to it, it has been agreed in this way between me and the said lady, with a view of permanently settling the dispute, and one having no connection with the other, that I have received Rs. 3,475 as the value of my half share in the house from the aforesaid lady, and have made over the deed appertaining to the said house *haveli*, to the lady, and have put her in possession of my half share of the house. Now the whole of the house is in the sole proprietary possession of the said Musammat, and I, the executant, have no connection whatever with it. Again, out of the house in

mohalla Gobindji Naik, the one-third share of the Musammath has been annexed to my share, and I have in the same way paid Rs. 830 to the Musammath, and have taken possession and occupancy of the entire house, and the said Musammath has made over the deed of the house to me. In short, I have been put in proprietary possession of the entire house, and the said Musammath has no objection to it, nor shall she have any hereafter."

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It appears that effect was given to this arrangement, and matters thus stood when, on the 23rd November 1882, Musammath Lachmi Bai, the widow of Ganoba, executed a deed-of-gift in favour of her brother's son, Ganpat Rao, who is the defendant-appellant in the cause. The deed assumes that the donor had an absolute, full and unqualified right in the ownership of the house in mohalla Dudh Binayak, and it purports to convey to the donee full proprietorship in the house. The deed does not appear to have been disputed during the lifetime of the widow, but the lady, Musammath Lachmi Bai, died on the 28th May 1885, and it was soon after her death, namely, the 12th February 1886, that the present suit was instituted with the object of recovery of possession of the property, upon the ground that the deed-of-gift dated the 23rd November 1882 could not convey to the defendant-donee any rights higher than the life-interest of the donor, namely, the widow.

From the facts which I have stated, it is clear that, if matters stood and rested entirely upon the propositions of the Hindu Law of inheritance, the family of Sheoram and his sons being joint, the death of Ganoba in 1852 would result in entitling the lady, Musammath Lachmi Bai, only to a right of maintenance out of the joint family property, and not to any right either to obtain partition of the property, or to institute any proceedings beyond the exigencies and requirements of her right of maintenance. I take this to be a settled principle of Hindu Law, and if we omit to consider the exact nature of the general rights of Musammath Lachmi Bai at the time when the deed of the 31st October 1854 was executed, we should scarcely be in a position to understand the aims, objects and intentions of the arrangements into which the



1888 parties had entered. It seems to me that there was no reason why the lady, Musammat Lachmi Bai, should have assigned any share in the ancestral property. Such an arrangement must be referred to some legal right which would form the consideration passing from one party to the other. That consideration could only be the right of maintenance, and Rama Chander need not have allowed the lady any more than the right to reside in the joint ancestral property and not any money allowance for maintenance. In this way of regarding the deed, I think I am fortified by the manner in which their Lordships of the Privy Council disposed of the case of *Sree-mutty Rabutty Dossee v. Sibchander Mullick* (1) when a deed somewhat similar in its nature was the subject of consideration, and also by the ruling of the learned Judges of the Calcutta High Court in *Dinonath Mukerji v. Gopal Churn Mukerji* (2), where the learned Judges held, in construing documents such as the arrangement and partition deeds of 1854, that the situation of the parties and their rights at the time of execution must be looked at, and indeed for this view they relied upon the ruling which I have already referred to.

Such then being the manner in which the deed should be regarded and construed, and keeping in view also the rules of the Hindu Law whereby widows are placed in possession of the joint family property and also the general experience of the tribunals in connection with such matters, I am of opinion that it was for the defendant-appellant, Ganpat Rao, to establish in clear specific terms that the lady, Musammat Lachmi Bai, when she executed the deed of gift of the 23rd November 1882 in his favour, possessed any such absolute right of ownership as would entitle her to alienate and deal with it in any manner which would go beyond her life-interest. This of course would depend upon something contained in either of the deeds of the 31st October 1854, but having carefully read through these deeds, I asked Mr. *Maithe Prasad* to point out any expression used in the deeds that placed beyond doubt the intention of the parties that Musammat Lachmi Bai

(1) 8 Moo. I. A., 1.

(2) 8 Cal. L. R., 57.

was entitled to have under them full ownership, and possessing such full ownership, was exercising the power of alienation which would be sufficient to confer an absolute and inalienable proprietary title. It is therefore clear that the estate of Musammât Lachmi Bai, putting the matter in its highest form, and looking to the time when the deeds were executed, could at best be said to be analogous to the position of a Hindu widow of a deceased brother, in other words, a life-interest and nothing more. But the deed of gift in favour of the defendant-appellant might be held to be good during her lifetime, and could not bind the plaintiff under the Hindu Law when her interest in the property had ceased.

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This arrangement, as I have understood it, is all the more conceivable, because it is perfectly possible, and indeed probable, that this sort of exchange of houses which took place under the partition deed of the 31st October 1854 was entered into to prevent such disputes as would arise on account of the widow Musammât Lachmi Bai having a right to live in a portion of the house in mohalla Dudh Binayak, and the plaintiff having a similar right to live in another house. The exchange of money, namely Rs. 3,475, paid to the plaintiff and Rs. 830 paid by the plaintiff to the widow, is fully explainable as a desire on the part of both the parties to have peace and secure comfort, and is not necessarily a reason for supposing that the transaction amounted to a sale absolute either by one party or the other.

I think that the learned Judge of the lower Court rightly decreed the claim, and no case has been made out for interference by us. I would therefore dismiss the appeal with costs.

STRAIGHT, J.—I am entirely of the same opinion.

*Appeal dismissed.*

1888  
December 19.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

JAGANNATH PRASAD (DEFENDANT) v. SITARAM (PLAINTIFF).\*

*Hindu Law—joint Hindu family—money-decree against deceased member—Execution after judgment-debtor's death against joint family property not allowed.*

The mere obtaining of a simple money decree against a member of a joint Hindu family without any steps being taken during his lifetime to obtain attachment under or execution of the decree, does not entitle the decree-holder, after the judgment-debtor's death and a subsequent partition, to bring to sale in execution of the decree the interest which the judgment-debtor had in the joint family property. *Suraj Bansi Koer v. Sheo Pershad Singh* (1), *Rai Balkrishen v. Rai Sita Ram* (2) and *Balbhadar v. Bisheshar* (3) referred to.

THIS was a suit brought under the following circumstances. The plaintiff, Rai Sita Ram, was the father of one Rai Manohar Das, who died on the 11th September 1874. The plaintiff and his son were members of a joint Hindu family, and no partition took place until some time after the death of Rai Manohar Das. The defendant, Jagannath Prasad, held a simple money decree which he had obtained on the 24th August 1874 in the Court of the Subordinate Judge of Benares against Rai Manohar Das alone. After the judgment-debtor's death, the decree-holder for the first time applied for execution of his decree against the joint family property. Execution was resisted by the plaintiff, but his objections were disallowed, and ultimately he brought the present suit for a declaration that the property in question was not liable to attachment and sale in execution of the defendant's decree.

The Court of first instance (Subordinate Judge of Meerut) decreed the suit, referring to the cases of *Balbhadar v. Bisheshar* (3), *Suraj Bansi Koer v. Sheo Parshad Singh* (1), *Debi Parshad v. Thakur Dial* (4), and *Goor Pershad v. Sheodeen* (5). The defendants appealed to the High Court.

Mr. G. T. Spankie, for the appellant.

Pandit Bishambhar Nath for the respondent.

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\* First Appeal No. 60 of 1887, from a decree of Babu Mirtonjoy Mukerji, Subordinate Judge of Benares, dated the 21st March 1887.

(1) I. L. R., 5 Cal., 148.

(3) I. L. R., 8 All., 495.

(2) I. L. R., 7 All., 731.

(4) I. L. R., 1 All. 106.

(5) N. W. P. H. C. Rep., 1873, p. 137.

EDGE, C.J., and TYRRELL, J.—The plaintiff in this suit was the father of one Rai Manohar Das, against whom the defendant had obtained a simple money-decree on the 24th August 1874. The plaintiff and his son were members of a joint Hindu family. The defendant here has entirely failed to prove that the son had separated from the family. Rai Manohar Das died on the 11th September 1874. After the death of Rai Manohar Das there was a partition of the family property between the plaintiff and another son or member of the family. No steps had been taken in the lifetime of Rai Manohar Das to obtain attachment under or execution of the decree. The defendant has sought, since the death of Rai Manohar Das, to have his decree executed against the family property. This suit was brought to have it declared that no part of the family property in the hands of the plaintiff was liable in execution of the decree of the 24th August 1874. It is contended by Mr. *Spankie* for the appellant, defendant below, that the mere fact of the defendant having obtained a money-decree against Rai Manohar Das in his lifetime entitled him to bring to sale the interest which Manohar Das had during his life in the family property. It appears to us that there is no authority to support that contention. In the case of *Suraj Bunsai Koer v. Sheo Pershad Singh* (1) their Lordships of the Privy Council, at page 174 of the report, decided that execution proceedings, which had gone as far as an attachment and an order for sale under a money-decree, did create a charge which entitled the judgment-creditor to proceed against the interest which the judgment-debtor had in his lifetime in the property which was attached. It appears to us that that judgment was based on the ruling that an attachment and order for sale did create a charge. If the obtainment of a mere money decree would have entitled the judgment-creditor in that case to bring the property then in dispute to sale, it would not have been necessary for their Lordships to have based their judgment on the fact that the attachment had taken place, and the order for sale had been made. The judgment in that case by implication shows that in a

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(1) I. L. R., 5 Calc., 148.

**1888** case such as this the judgment-creditor could not bring to sale after  
**JAGANNATH PRASAD** the death of the judgment-debtor the interest which the judgment-  
**v.** debtor had in the joint property of the Hindu family. The same  
**SITA RAM.** principle is to be found in the judgment in the case of *Rai Bal Kishen v. Rai Sita Ram* (1), and in the case of *Balbhadar v. Bishe-shar* (2). Under these circumstances the appeal must be dismissed, and the decree below confirmed with costs.

*Appeal dismissed.*

**1888**  
**December 21.**

*Before Mr. Justice Straight and Mr. Justice Mahmood.*

**MADAN GOPAL (PLAINTIFF) v. BHAGWAN DAS (DEPENDANT).\***

*Civil Procedure Code, s. 646B—Reference by District Judge of proceedings in Small Cause Court attached for want of jurisdiction.*

Before a District Court can make a reference under s. 646B of the Civil Procedure Code, it must be of opinion that the subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that therefore the matter is one in which the interference of the High Court should be sought.

The word "shall" in s. 646B., clause (1) is not mandatory, but directory.

THIS was a suit which was brought in the Court of Small Causes at Mirzapur for recovery of a sum of Rs. 114, alleged to be the balance due upon a partnership account. The defence was that the partnership accounts had not yet been adjusted, and that the suit would not lie. The Court decreed the claim in part, and held that the debt which the plaintiff sought to recover was one which had "nothing to do with the partnership account."

An application was then presented on behalf of the defendant to the District Judge of Mirzapur, purporting to be made under s. 646B of the Civil Procedure Code, and praying that the record of the case might be submitted to the High Court for orders. The application was based upon the contention that the suit was not cognizable by the Court of Small Causes. The District Judge thereupon passed the following order:—

\* Reference under Civil Procedure Code, s. 646B by W. T. Martin, Esq., Judge of the Court of Small Causes, Mirzapur.

(1) I. L. R., 7 All. 731.

(2) I. L. R., 8 All. 495.

"Under s. 646B, let the record be submitted. The Subordinate Judge holds that the debt in suit was a separate affair altogether from the partnership account. In that view the suit was cognizable by the Small Cause Court, but is submitted only at request of party."

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STRAIGHT, J.—This professes to be a reference made by the District Judge of Mirzapur under s. 646B of the Civil Procedure Code of 1882, as amended by Act VII of 1888. A suit was tried before the Subordinate Judge of Mirzapur sitting as a Small Cause Court Judge and was decided by a decree dated the 5th July 1888. Upon the 24th July the unsuccessful defendant in that suit applied to the Judge of Mirzapur for revision, so the petition is headed, under s. 646B of the Civil Procedure Code, as amended by s. 60 of Act VII of 1888. It is not necessary for me to enter into the grounds upon which the interference of the learned Judge was sought. It is sufficient to say that by two orders respectively dated the 24th and the 28th July, the Judge professed to refer the application for revision to this Court for disposal. It therefore, as a preliminary matter, becomes necessary to see whether the reference of the learned Judge has been regularly made, that is to say, in the manner contemplated by s. 646B, clause (1). In my opinion, the reference has been improperly made, as it appears upon the face of it. Section 646B, as I read it, provides for this state of things. Assuming that a Court subordinate to a District Court has held a suit instituted in that Court either to be cognizable by a Small Cause Court or not to be so cognizable, and has either failed to exercise a jurisdiction vested in it by law or has exercised a jurisdiction not vested in it by law, and the District Judge is of opinion that such Subordinate Court has erroneously held, in either of these alternatives, then the District Court may, of its own motion or at the motion of either of the parties, submit the record to the High Court with a statement of its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous.

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Putting it shortly, my view is that before a District Court can make a reference therein, it must be of opinion that the Subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and having so erroneously held, that, therefore, the matter is one in which the interference of the Court should be sought. I do not think that any importance is to be attached to the use of the word "shall," after the phrase "if required by a party." That is purely used in its directory sense; because the latter portion of the first clause of the section goes on to say that where a District Court acts of its own motion, it must "state its reasons" for considering the opinion of the Subordinate Judge's Court an erroneous decision.

The learned Judge in this case has neither stated that the decision is an erroneous one, nor has he given any reasons for coming to that conclusion. It appears to me, therefore, that the reference cannot be entertained by us, and that it should be returned to the learned Judge for him to take the matter up and deal with it in advertence to the observations that I have made and in accordance with the provisions of s. 646B of the Civil Procedure Code. If he is of opinion that the decision of the Subordinate Judge acting as a Small Cause Court Judge was right upon the question of jurisdiction, then he should not make a reference. If he thinks that it was wrong, then he may make a reference to this Court, recording his reasons for so doing. Let the papers be returned to the learned Judge with these remarks.

MAHMOOD, J.—I agree so entirely with what my learned brother has said, that it is scarcely necessary for me to add any further remarks. I am, however, anxious, because this is the first time within my experience as a Judge of this Court that this new s. 646B, which has been passed so late as this very year, has come under judicial consideration, to say that some doubt did arise in the course of the hearing in my mind as to the exact manner in which the word "shall" was to be interpreted, especially as it comes in close proximity to the word "may," with reference to the powers and duties of the District Judge. I think my learned brother's

view fully expresses why, with reference to the words that follow the "shall" we must take this "shall" not as strictly mandatory, but only directory; and that, if that word can be used in any greater sense, it can be only as qualifying the words relating to the opinion of the Judge as to the erroneous exercise of jurisdiction.

I fully agree with my brother that the references contemplated by s. 646B are limited to cases where the District Court is of opinion that there has been an error in the exercise of, or in the declining exercise of jurisdiction in cases of the kind mentioned in the section. The whole policy, as indicated by the Legislature of the enactments begun with Act XI of 1865, seems to be that statutes *in pari materia* have aimed at finality of decision in cases of the Small Cause Court type. It is not necessary to refer to the various sections of the various Acts, beyond saying that they uniformly uphold the desirability of enforcing finality to adjudications in such cases. That finality has been qualified by two classes of provisions; one conferring on the highest Court of appeal the powers of revision such as s. 622, Civil Procedure Code, contemplates, and in particular, with reference to Small Cause Court cases, by a provision such as s. 25 of the Provincial Small Cause Courts Act contemplates. Another manner in which the Legislature has thought fit to mitigate any failure of justice in consequence of the erroneous exercise of jurisdiction is this very section which my brother has interpreted, namely, s. 646B.

But whilst the Legislature has been so jealously careful to guard against the failure of justice, as my learned brother has put it, these references under s. 646B are not intended to apply to a case where a Judge has not exercised his mind to consider whether or not the Court below, whose judgment he was dealing with, had or had not jurisdiction. That section is limited only to cases where there has been an error. I fully agree in declining to answer this reference and in sending back the record to the Judge to be dealt with according to law.

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January 5.

## CRIMINAL REVISIONAL.

*Before Mr. Justice Straight.*

QUEEN-EMPRESS v. SHEODIN.

*Criminal Procedure Code, s. 395—Imprisonment in lieu of whipping—Court not authorized to inflict fine in lieu of whipping.*

A Court has no power, under s. 395 of the Criminal Procedure Code, to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, &c.

The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine.

In this case one Sheodin was convicted by Mr. G. Bower, a Magistrate of Mirzapur, under ss. 457, 380 and 75 of the Penal Code, and sentenced to two years' rigorous imprisonment and to receive thirty stripes. Subsequent to the passing of sentence, the Magistrate recorded the following order:—"The Civil Surgeon reports that Sheodin is unfit to be whipped. I, therefore, amend the sentence and strike out the whipping, and in its place inflict a fine of Rs. 30, or in default six months' more rigorous imprisonment, in accordance with the provisions of s. 395 of the Criminal Procedure Code."

The District Magistrate reported the case to the High Court with the following observations:—

"S. 395 of the Criminal Procedure Code allows the Court which inflicted a punishment of whipping, which punishment cannot be executed, to (at its discretion) either remit the sentence of whipping or sentence the offender, in lieu of whipping, to imprisonment for any term not exceeding twelve months. Nothing, however, in the section authorizes the Court to inflict imprisonment for a term exceeding that which the said Court is competent to inflict. Can this section be read as permitting a sentence of fine to be inflicted in lieu of the whipping, and then to commute that fine to one of alternative imprisonment?"

"New, Mr. Bower is only competent to inflict a sentence of two years' imprisonment as a Magistrate of the first class (s. 32, Criminal Procedure Code). This sentence he has already inflicted upon Sheodin. He can also inflict a fine, and, in lieu of fine, he can, under s. 33 of the Criminal Procedure Code, inflict a further maximum term of six months' imprisonment. But if s. 395 be held not to include in the words "to imprisonment" such imprisonment as is inflicted in lieu of fine, then in this case Mr. Bower could not inflict any further imprisonment upon Sheodin, because he had already sentenced him to the full term of imprisonment he was competent to inflict.

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"Suppose Sheodin paid up his fine of Rs. 30 : then he would not have undergone any imprisonment in lieu of the original sentence of whipping, but s. 395 only contemplates remission of the sentence of whipping altogether, or imprisonment in addition to any other punishment inflicted.

"At the same time it seems contrary to common sense that a man who is sentenced to a term of imprisonment and to a whipping in addition, as is allowed by law, should get off the additional sentence of whipping altogether, because he is declared unfit to be whipped, and at the same time, because the term of imprisonment inflicted upon him happens to be the full term of imprisonment *per se* the Court sentencing him is competent to inflict.

"I am, therefore, inclined to read the words 'to imprisonment,' taken along with the concluding paragraph of s. 395, as meaning imprisonment of any kind, whether original or alternative, a Court is competent to inflict, and that for the purposes of this case Mr. Bower's Court may be held to be competent to inflict a term of two years and six months' imprisonment.

"As I am in doubt, I submit the case."

STRAIGHT, J.—In my opinion the convicting Magistrate had no power, under s. 395 of the Criminal Procedure Code, to revise his sentence of whipping by inflicting a fine of Rs. 30 on Sheodin in lieu of such whipping. Consequently, it follows he had no power to

1889. direct any imprisonment for default in payment of such fine. All he could do was—

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(1) to remit the whipping altogether,

(2) to sentence the offender in lieu of whipping, or of so much of the sentence of whipping as was not executed, to imprisonment, &c.

In my opinion, "*imprisonment*" there means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine. If the Legislature had intended otherwise, it could easily have declared that a Court revising its sentence under s. 395 could substitute a fine for a whipping that could not be inflicted, but it has not done so, and I must presume that, having expressed itself clearly as to the power it gives, it intended to exclude every other power. Mr. Bower's order must be quashed to the extent that it ordered a fine of Rs. 30, or in default six months' rigorous imprisonment.

*Order quashed.*

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January 7.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

RADHA AND OTHERS (PLAINTIFFS) v. KINLOCK (DEFENDANT).\*

*Principal and surety—Omission by creditor to sue principal debtor within period of limitation—Discharge of surety—Act IX of 1872, Contract Act, ss. 134, 137.*

The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under s. 134 of the Contract Act (IX of 1872), even though the non-suing within such period arose from the creditor's forbearance.

Section 137 of the Contract Act does not limit the effect of s. 134. Its object is to explain and prevent misconception as the meaning of s. 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence.

*Hajarimal v. Krishnarav* (1) and *Krishto Kishori Chowdhraim v. Radha Romun Munshi* (2), dissented from. *Hazari v. Chuni Lal* (3) referred to.

\* Second Appeal No. 826 of 1887, from a decree of A. Sells, Esq., District Judge of Meerut, dated the 18th March 1887, reversing a decree of Babu Brijpal Das, Sub-ordinate Judge of Meerut, dated the 24th December 1886.

(1) I. L. R., 5 Bom., 647.

(2) I. L. R., 12 Calc., 330.

(3) I. L. R., 8 All., 259.

THIS was a suit for the recovery of Rs. 1,316-7-6 alleged to be due upon a surety bond executed by the defendants on the 5th January 1876. One Mangal was indebted to the plaintiff for a sum of Rs. 767-11-6, which he agreed to pay by yearly instalments, and the defendants by their bond engaged to pay any instalments not duly paid by him with interest. The present suit was instituted on the 19th June 1886, on which date it was admitted that the claim of the plaintiff against the principal debtor, Mangal, was barred by limitation. The Court of first instance (Subordinate Judge of Meerut) dismissed the suit on the ground that the legal effect of the omission of the plaintiff to enforce the claim against the principal debtor Mangal was his discharge, and consequently, under s. 134 of the Contract Act, the discharge of his sureties, the defendants.

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The plaintiff appealed to the District Judge of Meerut. The District Judge allowed the appeal and reversed the Subordinate Judge's decree, upon grounds which he stated as follows:—

“The simple question now to be decided is whether, under these circumstances, the plaintiff has any right to recover from the sureties. The lower Court has refused him relief. For the defendants it is contended that the omission to sue the principal within the legal period is, under s. 134, sufficient to discharge the sureties. But there is no legal obligation upon the creditor to sue his debtor, and under s. 137, forbearance on his part does not necessarily discharge the surety. And this would seem to show that it was intended that the words ‘discharge of the principal debtor’ should refer only to such a discharge as would presumably operate also as a discharge of the principal debtor *in regard to his obligation to the surety*. But in the present case the sureties defendants would still have their right of recovery against their principal. They are in fact in no worse position than they were before. The omission of the creditor to sue does not affect them; that is, it does not in any way affect the contract as entered into by them; and I am of opinion that the word ‘omission’ in s. 134 should be interpreted in the sense of s. 139; that it is intended to comprise such omissions only

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as would be omissions of *duty*, a neglect of certain acts which the creditor's duty to the sureties required him to perform. And this seems to be the view taken by the Bombay High Court in the case of *Hajarimal v. Krishnarav* (1). On the other hand, my attention has been drawn by the pleader for the defendants to the case of *Hazari v. Chunni Lal* (2) in the Allahabad High Court, which at first sight would seem to militate against the view taken above. But I am of opinion that it does not really do so. In that case the creditor had omitted to perform an act which was actually imposed upon him by the contract for the performance of which the security was given. That omission might seriously have prejudiced the interests of the sureties. In this respect, therefore, the Allahabad case differs materially from the present one and from the Bombay case. For these reasons then, I am of opinion that the lower Court is wrong in holding that the plaintiff's claim against the defendants has been extinguished. The appeal is accordingly decreed with costs."

The defendants appealed to the High Court.

Kunwar Shivanath Sinha, for the appellants.

Mr. Abdul Majid, for the respondent.

EDGE, C.J., and TYRRELL, J.—This appeal arises in a suit brought by a creditor against a surety on a contract of guarantee. The surety in his contract of guarantee had hypothecated certain immoveable property, and at the time when the suit was brought the rights of the creditor against the debtor whose debt was guaranteed were barred by limitation.

The Court below held that the surety was liable notwithstanding the fact that the remedies of the creditor against the debtor had been barred before the suit was commenced. The Court below came to the conclusion from a consideration of the case of *Hajarimal v. Krishnarav* (1). In this Court Mr. Abdul Majid for the respondent has relied upon the Bombay case and on the judgment in *Kristo Kishori Chowdhrair v. Radha Romun Munshi* (3), in which the ruling of the Bombay case was approved by the Calcutta

(1) I. L. R., 5 Bom., 647.

(2) I. L. R., 8 All., 259.

(3) I. L. R. 12 Calc., 330.

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Court. In the Bombay case Westrop, C.J., in delivering the judgment, we think, put a correct construction on s. 134 of the Contract Act (IX of 1872), that is to say, he held at page 650 of the report that the omission of a creditor to sue the principal debtor within three years from the date of the bond produced the legal consequence of the discharge of the principal debtor, but he also held, and in this we do not agree with that learned Judge, that the effect of s. 137 of the Contract Act is to make s. 134 inapplicable when the non-suing by the creditor on the debt within the period of limitation arose from his own forbearance. This latter view is a view also adopted by the Judges of the Calcutta Court, with which we do not agree. We think, as did Sir Michael Westropp, that it is quite plain that the legal consequence of the omission of a creditor to sue his debtor within the period of limitation would be the discharge of the surety, and it appears to us that s. 137 does not limit the effect of s. 134. In our opinion, ss. 135, 136 and 137 are founded upon the English law, and s. 137 is more a section by way of explanation and to prevent misconception as to the effect of s. 135 than a variation of the rule of law enunciated in s. 134. In our view, s. 137 applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence. The view of s. 137, which was adopted in Bombay and followed in Calcutta, is, in our opinion, inconsistent not only with s. 134, but with the policy of ss. 140 and 141. By s. 140, it is provided that when a guaranteed debt has become due, to take the case of a debtor only, the surety upon payment of the debt is invested with all the rights which the creditor had against the principal debtor. If the view adopted at Bombay be correct, that section applied to such a case as the present. The payment by the surety after the statutory period of limitation, so far as the debt was concerned, could not transfer to the surety any rights of the creditor against the principal debtor, for all those rights were barred at the time. Again, to take s. 141, it shows that the intention of the framers of the Act was that the surety should have the benefit of every security which the principal debtor had at the time the contract of surety was entered into. We fail to see what advantage it would

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be to the surety to have the security which the creditor possessed against the principal debtor at the date when the contract of guarantee was entered into, if the creditor's right to sue upon the security had become barred by limitation before payment by the surety. According to the law of England on which the Contract Act is principally framed, at least with regard to the sections in connection with contracts of guarantee, a surety could in an action brought against him by the creditor, avail himself of any set-off arising in the same transaction, of which the debtor might have availed himself if the creditor had brought the action against him. In our opinion the liability of the surety determined as soon as the liability of the principal debtor by the omission of the creditor was discharged. It appears to us that the view which we take is laid down in the judgment of this Court in *Hasari Lal v. Chunni Lal* (1). Holding the view which we do as to the law in this case, we allow the appeal and dismiss the action with costs.

*Appeal allowed.*

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January 18.

## FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight  
and Mr. Justice Tyrrell.*

MUHAMMAD SULAIMAN KHAN AND OTHERS (JUDGMENT-DEBTORS)  
v. FATIMA (DECREE-HOLDER).

*Practice—Execution of decree—Decree affirmed on appeal—Amendment of decree by first Court after affirmance—Objection by judgment-debtor to execution of amended decree—Appeal from order disallowing objection—Objection allowed on appeal.*

The decree of a Court of first instance having on appeal been affirmed by the High Court, the first Court altered the decree which had been affirmed, intending to bring it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment-debtor on the ground that that was not the decree which could be executed.

*Held* by the Full Bench that the objection must prevail, on the grounds that the decree sought to be executed was not that of the Appellate Court, and that the decree had been altered by the first Court, which had no power to alter it.

*Abdul Hayat Khan v. Chunia Kuar* (2) referred to.

(1) I. L. R., 8 All., 259.

(2) I. L. R., 8 All., 377.

*Held* by the Division Bench that the order of the first Court disallowing the objection and directing that execution of the decree as altered should proceed could not be regarded as passed under s. 206 of the Civil Procedure Code, but was an order passed in execution of decree and, as such, was appealable.

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THIS case was connected with *Muhammad Sulaiman Khan v. Muhammad Yar Khan* (1). Musammat Fatima obtained a decree against Muhammad Sulaiman Khan and others in the Court of the Subordinate Judge of Aligarh. On appeal, the decree was affirmed by the High Court on the 8th February, 1882. On the 18th July 1885, an order was passed by the Subordinate Judge, on the application of the decree-holder, amending the original decree, which was defective in not clearly specifying the property to which it related. After the amendment had been made, the decree-holder applied for execution of the decree as amended. The judgment-debtors opposed this application, on the ground that the decree of which execution was prayed was not the decree which could be executed. On the 29th August 1885, the Subordinate Judge disallowed the objection, and directed execution of the decree as amended.

The judgment-debtors appealed to the High Court from this order, on the ground that the Subordinate Judge had no jurisdiction to amend the decree, and that the decree as amended could not be executed.

A preliminary objection was taken on behalf of the respondent to the hearing of the appeal on the ground that the Subordinate Judge's order was passed under s. 206 of the Civil Procedure Code, dealing with an objection to the amendment of the decree, and was therefore not appealable.

The Hon. Pandit *Ajudia Nath* and Pandit *Harkishen Das*, for the appellants.

Mr. *Amir-ud-din*, for the respondent.

The Court gave judgment first upon the preliminary objection as follows :—

STRAIGHT, J.—This has been filed as a first appeal from order in execution of decree, and the appellants are the judgment-debtors,

(1) *Ante*, p. 267.



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and the respondent the decree-holder. Mr. *Amir-ud-din*, the counsel for the respondent, takes a preliminary objection to the hearing of the appeal, on the ground that the order it assails was an order passed under s. 206 of the Civil Procedure Code, and dealt with an objection to the amendment of the decree. I dissent from that view. It seems to me that the order of the Subordinate Judge, which is the subject-matter of appeal here, was an order passed in execution of decree. An application to execute the decree had been made upon the 24th September 1878, and subsequently to that application a variety of proceedings had taken place, the result of which was that, somewhere prior to June 1885, the decree-holder had intimated her intention to obtain amendment of the decree, and ultimately, upon the 18th July, 1885, that decree was amended. On the 29th August 1885, the matter came before the Subordinate Judge in the shape of an application for the purpose of proceeding with the execution of the amended decree, and it was in reference to that application for execution to proceed, that he determined by his order which is now impeached, the matter that was then before him. I do not, therefore, think that his order can, as Mr. *Amir-ud-din* contends, be regarded as an order passed under s. 206 of the Civil Procedure Code, in which case it would be an unappealable order, and only open to revision under s. 622 of the Code, but I regard it as an order passed in execution of a decree, from which an appeal has been properly preferred. This disposes of the preliminary point, and we shall in due course proceed with the determination of the appeal.

BRODHURST, J.—I am of the same opinion.

The hearing of the appeal was then proceeded with; and ultimately on the 13th August 1888, the appeal was referred to a full Bench, by the following order:—

STRAIGHT, J.—This case is connected with a reference which was before the learned Chief Justice, my brother Mahmood and myself, in which the question, to put it broadly, was whether, when once a case has gone in appeal to an appellate Court, and been decided by such appellate Court, the lower Court could disturb or

amend the decree passed by it, under s. 206 of the Civil Procedure Code. The learned Chief Justice and myself have held that the decree of the appellate Court is the only decree which is capable of amendment under s. 206 of the Civil Procedure Code. The question raised by this appeal is in some sense connected with that reference to the learned Chief Justice, my brother Mahmood and myself.

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But this raises the further question as to whether a decree having been erroneously amended by a first Court after there has been an appeal, when such amended decree is sought to be put into execution, the Court asked to execute it can go into the question whether it has been properly or improperly amended.

In my opinion, having regard to a series of decisions of this Court, which have held that a Court executing a decree must take it as it finds it, and not enter into any question as to whether it was made with or without jurisdiction, the present appeal should fail. But as there is a ruling of my brothers Oldfield and Brodhurst in *Abdul Hayai Khan v. Chunia Kuar* (1) taking a contrary view, I think it would be desirable that this case should be determined by a Bench consisting of the learned Chief Justice, my brother Brodhurst, and myself. I accordingly, subject to the learned Chief Justice's approval, direct that it should be so heard and determined.

BRODHURST, J.—I concur in referring the case to a Full Bench. The case again came on for hearing on the 18th January, 1889, when the following judgments were delivered by the Full Bench:—

EDGE, C.J.—In this case the decree of the late Subordinate Judge of Aligarh was on appeal to this Court confirmed on the 8th February, 1882, and on the 18th July, 1885, another Subordinate Judge altered the decree which had been confirmed, intending, no doubt, to bring it into accordance, from his point of view, with the judgment of the High Court. Whether the decree, as confirmed by the High Court, correctly represented the judgment of the High Court, is absolutely immaterial for present purposes. After the decree had been altered, application was made to execute the decree as altered. Objection was taken that that was not the

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decree which could be executed. The Subordinate Judge of Aligarh disallowed the objection and ordered the altered decree to be executed. Hence this appeal here.

It has been decided in this Court that the Court executing a decree cannot alter the decree which it receives to execute. But it has been held by Mr. Justice Oldfield and my brother Brodhurst in the case of *Abdul Hayai Khan v. Chunia Kuar* (1) that when a decree-holder proceeds to execution it is open to the person against whom execution is prayed to show that the decree which is sought to be executed is not the decree of the Court to be executed. It has also been decided that when a decree has been confirmed by an appellate Court the Subordinate Court cannot amend the decree. It has also been decided by this Court that when a decree has been confirmed by the appellate Court, the decree to be executed is the decree of the appellate Court. In this particular case there were two good objections to the execution—one was that it was not the decree of the appellate Court, and secondly, that the decree had been altered by the Subordinate Judge, who had no power to alter it. I think the appeal should be allowed and the order of the Subordinate Judge set aside. The appellants to get their costs in all the Courts.

STRAIGHT, J.—I am of the same opinion. It is now established beyond all question that upon the 29th August, 1885, the amended decree of which the Subordinate Judge directed the execution was not worth the paper it was written upon, because that amendment of it had been made by a Court not having power to make it. Consequently any execution upon the basis of that decree took place without authority or legal countenance and cannot be sustained. The plea in appeal is a well founded plea, and I am of opinion that it should prevail. Therefore the result is that the order of the Subordinate Judge being set aside this appeal succeeds with costs.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight in decreeing the appeal with costs.

*Appeal allowed.*

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Tyrrell.*

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January 19.

**HARDEI (PLAINTIFF) v. RAM LAL (DEFENDANT).\***

*Registration—Act III of 1877 (Registration Act), ss. 49, 60—Certificate of registration—Distinction between act of registering officer and conduct of parties—Certificate not invalidated and document not made inadmissible by erroneous procedure in presenting or admitting execution.*

The word “registered” as used in s. 49 of the Registration Act (III of 1877) refers to the act of registration by the registering officer, and not to matters of procedure or conduct of the parties seeking registration, which are governed by special provisions of the Act. S. 49, read with s. 60, only means that a document, to be admissible in evidence for the purposes of the former section, must be registered, *i.e.* the officer must, under s. 60, have put upon it the certificate required by that provision. If he has done so, the document bearing such certificate becomes admissible in evidence: if he has not, or there has been no registration of the document, then such document is inadmissible. Where the document bears such a certificate, it is registered within the meaning of s. 60 and becomes under the second paragraph thereof admissible in evidence, and the operation of the second paragraph is not interfered with by s. 49.

Where, therefore, the lower appellate Court rejected as inadmissible in evidence under s. 49 a deed of gift of immoveable property upon which was endorsed a certificate under s. 60, on the ground that the person presenting it for registration and admitting execution was not qualified to do so under ss. 32 and 35, and the registration was consequently void and the document not registered under s. 17 (a),—*held* that the Court was wrong in so doing, and ought to have looked at and dealt with the document.

*Har Sahai v. Chunni Kuar* (1), *Ikbal Begam v. Sham Sundar* (2), *Bishunath Naik v. Kalliani Bai* (3), *Husaini Begam v. Mulo* (4), *Sheo Shunkar Sahoy v. Hirdey Narain Sahu* (5), *Muhammad Ewaz v. Birj Lal* (6), *Sah Mukhun Lal Panday v. Sah Koondan Lal* (7), *Majid Hosain v. Fazl-un-nissa* (8), referred to.

THIS was a reference to the Full Bench by Straight and Brodhurst, JJ., of the determination of a second appeal. The order of reference was as follows:—

“The plaintiff is the widow of Har Narain, son of Bal Kishan, and she sues to enforce a deed of gift of a house, made in her favour by her father-in-law on the 1st December, 1885, upon the allegation that Bal Kishan having died on the 2nd December, 1885, the

(1) I. L. R., 4 All., 14.

(2) I. L. R., 4 All., 384.

(3) Weekly Notes, 1882, p. 175.

(4) Weekly Notes, 1882, p. 183.

(5) I. L. R., 6 Calc., 25.

(6) L. R., 4 I. A., 166.

(7) L. R., 2 I. A., 210.

(8) L. R., 16 I. A., 19.

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defendant, a cousin of Bal Kishan, on the 24th February, 1886, wrongfully dispossessed her of the same. The defendant pleaded, among other matters, that he and Bal Kishan were members of a joint Hindu family; that on the latter's death, the property left by him devolved on the defendant; that the plaintiff is therefore only entitled to maintenance; that at the time of the alleged gift, Bal Kishan had lost consciousness, and that the deed of gift was not duly registered. The first Court found that the defendant and Bal Kishan were not joint, and that the deed of gift was executed by the latter. Upon the question of registration, the Munsif expressed himself as follows:—

“The facts are, that three days before his death, Bal Kishan, having got the deed written, entrusted it to Pandit Kashi Nath to get it registered. Pandit Kashi Nath explains the transaction as below:—

“I know Bal Kishan; three days before his death he had a deed of gift written by Mannu Lal, which he entrusted to me to get registered, telling me that he could not go himself as he was seriously ill, and had dysentery. After his death, I had the deed registered. The same day when it was written, I went, but the Registrar had risen. Next day I went again, but the Tahsildar was not there, and the Peshkar had gone to look after supplies for the troops. On the third day, Bal Kishan died.’ Again in cross-examination, ‘Bal Kishan handing the gift to me, told me to bring the Registrar to his house, and there and then get the deed registered. Bal Kishan had given me Rs. 10 to be paid to the Tahsildar as commission, which money I returned to Shiuji Ram.’ Now in these circumstances it was presented to the Registrar by Pandit Kashi Nath a few days after Bal Kishan's death, and was registered under para. 3 of s. 35, Registration Act. It is argued on behalf of the defendant that all that Bal Kishan directed Kashi Nath was to bring down the Registrar to his house, and there get it registered in his presence, and that his direction did not authorize Kashi Nath to have it registered after his death, in the manner Kashi Nath got it registered, so that Kashi Nath could not be an assign of Bal

Kishan. I think the argument does not hold. The object for which the deed was entrusted to Kashi Nath was its registration, and if for the Tahsildar's absence from his office, it could not have been registered in the manner suggested by Bal Kishan, the only way in which it could be registered was the way in which it has been registered. Thus only could the object be accomplished by the only means available to Kashi Nath. I am of opinion that the deed was assigned to Kashi Nath for registration, he had the executant's authority for the purpose, and he was his assign.

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"From the decision of the Munsif, the defendant appealed, and the learned Judge reversed his decision, holding that Pandit Kashi Nath was not an assign of the deceased Bal Kishan within the meaning of s. 32 or s. 35 of the Registration Act, and that consequently the registration of the deed of gift, under which the plaintiff claimed, was void, and thus the deed of gift itself must be held to be void as not having been registered under s. 17, clause (a) of the Registration Act.

"From this decision of the Judge, the plaintiff appealed to this Court, and the two points urged before us were—

"1. That the deed being in fact registered, any defect in the procedure with regard to its registration cannot invalidate such registration.

"2. That the registration was valid.

"It may be convenient to give a translation of the registration endorsement which runs in the following terms:—

"This document was presented for registration in the office of the Sub-Registrar of Khurja, in the district of Bulandshahr, on Tuesday, the 5th January, 1886, between 1 and 2 p.m. with an application under s. 35, Act III of 1877. The execution of this document was acknowledged on behalf of Bal Kishan, son of Budh Sen, Brahman, resident of Khurja, the deceased executant of the deed, who had died after executing and depositing the deed, by Pandit Kashi Nath, son of Shiu Parshad, Brahman, resident of Khurja, aged 45, the assign (*Mufabwazilat*) of the deed, and he

1889 was identified by Mannu Lal, son of Jahangir Mal, caste Banya,  
 HARDEI and Bansidhar, Brahman."

v.  
 RAM LAL. The case came for hearing before a Full Bench consisting of  
 Edge, C.J., and Straight and Tyrrell, JJ. On the 27th July,  
 1888, their Lordships passed the following order :—

" Before we can dispose of this reference, it is necessary that we  
 should have findings recorded by the Lower Court upon the follow-  
 ing issues :—

" 1. Was the deed of gift executed by Bal Kishan ?

" 2. Was the deed of gift delivered to Kashi Nath by Bal Kishan  
 for the purpose of being registered.

" 3. Did Bal Kishan merely direct Kashi Nath to bring the  
 Registrar to his house so that he, Bal Kishan, might personally  
 effect registration, or did he give the deed to or leave it in the  
 hands of Kashi Nath, so that it might be registered under any  
 circumstances ?

" 4. In presenting the deed of gift for registration, did Kashi  
 Nath act *bona fide* and in the honest belief that in doing so he was  
 carrying out the wishes and intentions of Bal Kishan ?

" The lower Court will also dispose of the questions of fact  
 raised by the third, fourth and fifth pleas in the memorandum of  
 appeal in the Court below."

The third, fourth and fifth pleas in the memorandum of appeal  
 in the Court below were as follows :—

" 3. The delivery of possession under the deed of gift is not  
 shown, inasmuch as Bal Kishan used to live till his death in the  
 disputed house. Even if the deed of gift be taken as genuine, it is  
 invalid under the Hindu Law.

" 4. The documentary evidence proves that the house in which  
 the door and almirah of the appellant's house are fixed is the exclu-  
 sive property of the appellant, and has been all along in his posses-  
 sion. The decree of the Lower Court for demolition of the door and  
 window is entirely improper.

"5. The evidence on record shows that the wall in which there is a window and an almirah belongs to the house of the appellant and is his property. Therefore the plaintiff is not entitled to sue in respect of the constructions and changes therein."

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On the remand, the District Judge of Meerut found, with reference to the issues remitted by the High Court, (i) that the deed of gift was executed by Bal Kishan, (ii) that the deed of gift was delivered to Kashi Nath by Bal Kishan for the purpose of being registered, (iii) that Bal Kishan intended that the deed should be registered under any circumstances, and (iv) that in presenting the deed for registration Kashi Nath acted *bona fide* and in the honest belief that in doing so he was carrying out Bal Kishan's wishes. In reference to the third, fourth and fifth pleas taken in the memorandum of appeal to the lower Court, the District Judge found (i) that the donee was living with the donor in the house prior to the donor's death, and that the necessity for any formal delivery of possession was therefore obviated, (ii) that the house in which the defendant's door and almirah were fixed had belonged to the donor Bal Kishan and the defendant Ram Lal jointly, and (iii) that the wall in question, since the death of Bal Kishan, belonged exclusively to the defendant.

The case now came before the Full Bench for disposal.

The Hon. Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellant.

Mr. *G. T. Spankie* for the respondent.

STRAIGHT, J.—This reference to the Full Bench which concerns the determination of the second appeal referred involves three questions.

The first of those questions is, whether the deed of gift of the 1st December, 1885, was admissible in evidence as not being barred by any provision to be found in the Registration Act of 1877.

Secondly, whether any inference from the findings recorded in the Court below, or from any other materials, is warranted that the donee obtained possession under the gift.



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And thirdly, whether, in regard to the finding of the learned Judge as to the division wall, the decision of the first Court should be modified.

The first of these questions is not *res integra*, as far as this Court is concerned, because a number of rulings more or less bearing upon it have been referred to by Pandit *Sundar Lal* who appeared on behalf of the appellant. Those rulings are *Har Sahai v. Chunni Kuar* (1), *Ikkal Begam v. Sham Sundar* (2), *Biskunath Naik v. Kalliani Bai* (3), *Husaini Begam v. Mulo* (4). In those rulings a decision of the Calcutta High Court in *Sheo Shunkar Sahoy v. Hirdey Narain Sahu* (5) was referred to, approved and followed, and in one of those rulings reference was also made to a judgment of their Lordships of the Privy Council, *Muhammad Ewas v. Birj Lal* (6). In this connection I may also refer to another ruling of their Lordships of the Privy Council, a portion of which is recited in *Sah Mukhun Lal Panday v. Sah Koondun Lal* (7).

The determination of the question as to whether under s. 60, para. 2 of the Registration Act, the deed of gift of the 1st December, 1885, was duly registered, turns upon the meaning to be attached to s. 49 of the same Act, which must be looked at to see whether it in any way cuts down the operation of the second paragraph of s. 60 as to the effect the certificate endorsed upon a document by a registering officer shall have to show it was duly registered. S. 49 provides that no document required by s. 17 to be registered shall, among other things, be received as evidence of any transaction affecting such property, "unless it has been registered in accordance with the provisions of this Act."

I have given the construction and language of this section the best consideration I can, and in my opinion the word "registered" as used in s. 49 has reference to the act of registration by the registration officer, and is not directed to or concerned with any matter of procedure or conduct of parties seeking registration, which is to

(1) I. L. R., 4 All., 14.

(2) I. L. R. 4 All., 384.

(3) Weekly Notes, 1882, p. 175.

(4) Weekly Notes, 1882, p. 183.

(5) I. L. R., 6 Calc., 25.

(6) L. R., 4 I. A., 166.

(7) L. R., 2 I. A., 210.

be guided and governed by those provisions of the registration law which direct what they should do for the purpose of effecting or bringing about registration of a document. I take s. 49, read in conjunction with s. 60, to mean nothing more than this, that a document to be admissible in evidence for the purposes of s. 49 must be registered, that is to say, the registration officer must under s. 60 have put upon that document the certificate which s. 60 requires him to put, and if he has done so the document bearing such certificate under s. 60 becomes admissible in evidence, but if he does not do so or there has been no registration of such document, then the document cannot be received as evidence because it has not been registered. This view is not without authority, because I observe that Sir Barnes Peacock in the course of his judgment in *Sah Mukhun Lal Panday v. Sah Koondun Lal* (1) observes:—"Again it is not clear that the words 'unless it shall have been registered in accordance with the provisions of this Act' in s. 49 are not, especially as regards strangers to the deed, confined to the procedure on admitting to registration without reference to any matters of procedure prior to registration or to the provisions of ss. 19, 21, 36 of the Act or other provisions of a similar nature. In considering the effect to be given to s. 49, that section must be read in conjunction with s. 88, and with the words of the heading of part 10, 'of the effects of registration and non-registration.' Now, considering that registration of all conveyances of immoveable property of the value of Rs. 100 or upwards is by the Act rendered compulsory, and that proper legal advice is not generally accessible to persons taking conveyances of land of small value, it is scarcely reasonable to suppose that it was the intention of the Legislature that every registration of a deed should be null and void by reason of a non-compliance with the provisions of s. 19, 21, or 36 or other similar provisions. It is rather to be inferred that the Legislature intended that such errors or defects should be classed under the general words 'defect in procedure' in s. 88 of the Act, so that innocent and ignorant persons should not be deprived of their property through

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(1) L. R., 2 I. A., 210.

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any error or inadvertence of a public officer, on whom they would naturally place reliance. If the registering officer refuses to register the mistake may be rectified upon appeal under s. 83 or upon petition under s. 84, as the case may be; but if he registers where he ought not to register, innocent persons may be misled and may not discover, until it is too late to rectify it, the error by which, if the registration is in consequence of it to be treated as a nullity, they may be deprived of their just rights. It is unnecessary, however, to express any opinion on this point, as it has been decided between these parties that, notwithstanding the first registration, the deed must be considered as unregistered. Neither of the parties appealed from the decision, and therefore whether right or wrong in point of law, they are both bound by it in this suit, and it must be assumed as against them in this appeal that the first registration was a nullity."

It is to be remarked that there was no specific decision upon the precise point involved in the present case, but nevertheless their Lordships of the Privy Council do seem to have broadly stated their opinion that non-compliance with the provisions of s. 36, that is to say, non-attendance of the executant of an instrument before the Registrar, and his registering the instrument under those circumstances, would not on that account render his proceedings invalid.

Again it seems to me that the ruling of their Lordships of the Privy Council in the case of *Majid Hossain v. Fazl-un-nissa* (1) favours the view that I have been putting forward. Their Lordships in that case thought that although there had not been a strict compliance with the specific directions of the rules laid down in the Registration Act, a party must go to the office of the Registrar and present the instrument there, nevertheless where the Registrar had gone to the house of the executant and having ascertained all necessary particulars, had then registered the instrument, such a registration was a substantial compliance with the provision of the registration law. Indeed, to use the words of their Lordships,

(1) L. B., 16 I. A., 19.

"This registration, in fact, took place at the office of the pargana Registrar, though the officer attended to receive the deed to receive its acknowledgement, and to compare the deed with the copy. He brought it all to his own office and the registration is, in fact, the recording of the copy in the office of the pargana Registrar, all the other requisites provided by the rule having been otherwise complied with."

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That case is an authority for this, that though a direction in the statute to parties seeking registration of a document had not in terms been complied with, nevertheless the certificate of the Registrar was held to be sufficient and satisfactory proof of due and proper registration.

In the present case we have before us a specific certificate from the Registrar to the effect that the particular document, *i.e.*, the deed of gift, was registered. It is not necessary for me to go at length through the reasons that seem to underlie the rulings of their Lordships of the Privy Council, for they are very fully stated in *Muhammad Ewaz v. Birj Lal*, (1) and Sir Montague E. Smith has explained in that case how the object of the registration law being to afford notoriety to instruments relating to immovable property, the circumstance that a document has been, in fact, registered, satisfies the object at which the statute aimed. Here the deed of gift was registered on the 5th January 1886, the object of the registration law was satisfied, and there was notice from that time that such instrument was in existence. I am therefore of opinion that this document, bearing as it did a registration certificate, was registered within the meaning of s. 60 of the Registration Act, that under para. 2 of that section it became admissible in evidence, and that there is nothing in s. 49 which militates with that view or interferes to prevent the operation of the second paragraph of s. 60. I think that the learned Judge was wrong in holding that this document was not admissible in evidence, and that the Court below ought to have looked at it and dealt with it to the extent it deserved.

(1) L. R., 4 I. A. 166.

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The second question is, are there materials before us which sustain the inference that the donee Musammat Hardei obtained possession under the deed of gift. Looking to the matters detailed by the learned Judge and to all the facts stated in the judgment, it seems to me they are consistent with the plaintiff having received possession under the deed of gift, at any rate there are no facts inconsistent with that view, and I think we may fairly assume that she did have possession.

With regard to the finding as to the wall, that seems to be more or less in accordance with what was found by the first Court. I would suggest that the proper order to be made is that the appeal of the plaintiff being allowed and the decree of the learned Judge set aside, that of the first Court should be restored, and the plaintiff-appellant will have her costs in all the Courts.

EDGE, C.J.—I am of the same opinion and for the same reasons as given by my brother Straight.

TYRRELL, J.—I concur.

*Appeal allowed.*

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 January 28.

## APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

IMTIAZ BANO (PLAINTIFF) v. LATAFAT-UN-NISSA AND OTHERS  
 (DEFENDANTS).\*

*Partition—Question of title—Act XIX of 1873 (North-Western Provinces Land Revenue Act), s. 113—Appeal from order under first part of s. 113—Practice—Successful preliminary objection to appeal—Costs.*

No appeal lies to the High Court from a decision of a Collector or Assistant Collector under the first part of s. 113 of the North-Western Provinces Land Revenue Act (XIX of 1873), declining to grant an application for partition until the question in dispute has been determined by a competent Court.

Where a preliminary objection was successfully taken to the hearing of an appeal, the High Court refused to follow the practice adopted in bankruptcy appeals in England by depriving the respondent of costs on the dismissal of the appeal on the ground that the appellant had no previous notice of the preliminary objection. *Ex parte Brooks* (1), and *ex parte Blease* (2) referred to.

\* First Appeal No. 107 of 1887 from a decree of Munshi Gursaran Das, Deputy Collector of Budaun, dated the 22nd May, 1887.

(1) L. R., 13 Q. B. D., 42.

(2) L. R., 14 Q. B. D., 123.

THE facts of this case are sufficiently stated in the judgment of the Court.

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IMTIAZ BANO

The Hon. T. Conlan and Mr. G. E. A. Ross, for the appellant.

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Mr. A. H. G. Reid and Pandit Sundar Lal, for the respondents.

EDGE, C.J., and TYRRELL, J.—This appeal has arisen out of an application in the Revenue Court for partition. The Deputy Collector, having looked into the objections which were filed and the matters to which those objections referred, exercised the discretion that was given to him under the earlier portion of s. 113 of the North-Western Provinces Land Revenue Act (XIX of 1873) and declined to grant the application until the questions in dispute had been decided by a competent Court. He did not adopt the other alternative given him by the section of proceeding to enquire into the merits of the objections, which would have necessitated his recording a proceeding declaring the nature and extent of the interest of the party or parties applying for the partition and any other party or parties who may be affected thereby. The judgment or whatever it may be called of the Deputy Collector is mis-translated in the paper book before us. As a matter of fact, in the vernacular record the phraseology is that used in the vernacular translation of the earlier portion of s. 113.

A preliminary objection has been taken on behalf of the respondents that the appeal does not lie. We are of opinion that that objection must prevail, there being no appeal to us from a declining to grant the application under the earlier portion of s. 113. We are asked by the appellant to deprive the respondents of costs on the dismissal of the appeal on the ground that the appellant had no previous notice of the preliminary objection that has now prevailed. Two English cases in Bankruptcy have been cited as authorities, which it is contended that we should follow. The first is *ex parte Brooks* (1) and the other is *ex parte Blease* (2). In each of those cases the preliminary objection only required to be stated to succeed. We, however, see no reason to depart from the practice of this Court in these matters. We do not see any

1889 reason why we should follow what apparently is the special practice of Courts in England in deciding bankruptcy appeals. The  
 IMTIAZ BANO v. LATAFATUN-NISSA. appeal is dismissed with costs.

*Appeal dismissed.*

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 Jany. 29.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

HAR SABAN DAS (PLAINTIFF) v. NANDI AND ANOTHER (DEFENDANTS).\*

*Hindu Law—Hindu widow—Re-marriage—Act XV of 1856, s. 2—Remarriage of widow who could have remarried before the Act was passed.*

Act XV of 1856 was not intended to place under disability or liability persons who could marry a second time before the Act was passed. It was intended to enable widows to re-marry who could not previously have done so, and s. 2 applies to such persons only.

*Held* therefore that a widow belonging to the sweeper caste, in which there is not, and in 1856 was not, any obstacle by law or custom against the remarriage of widows, did not by marrying again forfeit her interest in the property left by her first husband; and that the reversioners could not prevent the sale of such interest in execution of a decree for enforcement of hypothecation.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Pandit *Moti Lal Nehru* for the appellant.

Munshi *Madho Prasad* for the respondents

STRAIGHT, J.—This appeal relates to a suit brought by the plaintiff before us under the following circumstances:—Prior to the year 1884, the defendant Musammat Nandi was married to a man of the name of Kashmiri, who, it is alleged, had monetary transactions with the plaintiff. He died, and on the 14th December, 1884, Musammat Nandi made a hypothecation bond for the consideration of a sum of Rs. 200 in respect of two kothas which had belonged to her deceased husband, Kashmiri. Subsequent to the execution of the bond defendant married a person of the name of Bhujjo, and afterwards the plaintiff brought a suit upon the hypothecation bond of the 14th December, 1884, against the defen-

\* Second appeal, No. 1084 of 1887, from a decree of Maulvi Saiyid Muhammad, Subordinate Judge of Saharanpur, dated the 14th April 1887, confirming a decree of Babu Ganga Saran, Munsif of Shaharanpur, dated the 20th August, 1886.

dant, and obtained a decree for enforcement of lien, and in execution of the decree proceeded to attach the two kothas hypothecated to him. Thereupon the two other defendants, Bansi and Bholu, as brothers of Kashmiri, objected to such attachment upon various grounds, and the Court executing the decree accepted those objections and released the attachment. Thereupon, on the 24th July, 1886, the plaintiff instituted the present suit, by which he seeks to avoid the order releasing the attachment, and to be placed in a position to bring the property to sale. It is sufficient, for the purpose of dealing with the appeal, to say that the suit was resisted by the two defendants, Bansi and Bholu, upon the ground that the bond in favour of the plaintiff was not executed by Musammat Nandi in respect of any debt due or owing from Kashmiri; and, secondly, that, by the circumstance that Musammat Nandi had married a second time, any interest which she acquired upon the death of her husband, Kashmiri, in the two kothas had been forfeited, and had passed to the defendants. As to the first of these two points, both the Courts below have found that the plaintiff has failed to establish that the bond transaction of 1884 was in respect of any debt due or owing from Kashmiri, or that, if it was, the debt was not, in fact, owing; and that, therefore, there was no right as against the immovable property left by him to recover the amount. Both the Courts have also held that, under s. 2 of Act XV of 1856, the rights and interests which Musammat Nandi acquired from her deceased husband, Kashmiri, were by her second marriage to Bhujjo forfeited, and upon these grounds the plaintiff's suit was dismissed. From the decision of the Subordinate Judge this appeal has been preferred; and as to the first ground upon which the decision was passed, it cannot be assailed by the pleader on behalf of the plaintiff, because it relates to a finding of fact; and it must, therefore, be taken that the transaction recorded by the bond of 1884 was a transaction purely between Musammat Nandi in respect of an obligation of her own to the plaintiff; and the transaction, therefore, in no way binds any permanent interest in her husband's two kothas.

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But the learned pleader on behalf of the plaintiff says that the Courts below have placed a wrong construction upon s. 2 of Act XV of 1856, and I agree with him. It is admitted that the woman Nandi was of the sweeper caste, and in that caste there is no legal obstacle or hindrance, either by law or custom, or otherwise, nor is any suggested, against remarriage; and it must be taken that this condition of things has been existing in the caste for years past, and was existing in the year 1856. Accordingly, when Musammat Nandi married Bhujjo, she did what in her caste never had been and was not prohibited by the law to which she was subject, and her marriage was a good and valid marriage. I do not think that looking to the preamble to Act XV of 1856, which refers to Hindu widows, it was ever intended to apply to persons in the position of Musammat Nandi, or to place under disability or liability persons who could marry a second time before the Act was passed. The Act was passed for the purpose of enabling persons to marry who could not remarry before the Act, and s. 2 only applies to such persons. By her second marriage, Musammat Nandi, in my opinion, did not forfeit her interest in the two kothas. Under these circumstances, the plaintiff is entitled, as against his judgment-debtor, to enforce his obligation, and to bring to sale her interest therein, whatever it is. I accordingly decree the appeal, and, reversing the decree of the two lower Courts, direct that the plaintiff's suit do stand decreed and it be directed that he is entitled to bring to sale in execution of his decree against Musammat Nandi such interest as she had in the two kothas. The plaintiff will receive his costs of the appeal in this Court. In the two lower Courts the parties will pay their own costs.

BRODHURST, J.—I concur.

*Appeal allowed.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.*

GANGA PRASAD (AUCTION-PURCHASER) v. JAG LAL RAI  
AND OTHERS (OBJECTORS.)\*

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March 5.

*Execution of decree—Sale of immoveable property in execution—Sale held before expiration of thirty days from the proclamation—Civil Procedure Code, ss. 290, 311—Application by judgment-debtor to set aside sale—"Illegality" "Material irregularity"—Proof of substantial injury, whether necessary.*

Where a sale of immoveable property in execution of a decree took place before the expiration of the thirty days required by s. 290 of the Civil Procedure Code, and without the consent of the judgment-debtor,—*held* by EDGE, C. J., (BRODHURST, J., dissenting) that the holding of the sale under these circumstances was not merely an irregularity within the meaning of s. 311 of the Code, but was an illegality, and that it was open to the judgment-debtor to object to the sale and to apply to have it set aside, on the ground of such illegality, without proving that he had sustained any substantial injury.

*Held* by BRODHURST, J., *contra*, that infringement of the rule contained in s. 290 of the Code does not of itself vitiate a sale in execution of decree, but is a "material irregularity" within the meaning of s. 311—that expression being wide enough to include illegalities—and that before such a sale can be set aside, the judgment-debtor must prove that he has sustained substantial injury by reason of such irregularity.

*Olpherts v. Mahabir Pershad Singh* (1), *Mohunt Megh Lall Pooree v. Shih Pershad Madi* (2), *Kalytara Chowdhraïn v. Ramcoomar Goopta* (3), *Tripura Sundari v. Durga Churn Pal* (4), *Bonomali Mozumdar v. Woomesk Chunder Bando-padhya* (5), *Bandy Ali v. Madhub Chunder Nag* (6), *Nathu v. Harbhuj* (7), *Jasoda v. Mathura Das* (8), and *Bakshi Nand Kishore v. Malak Chand* (9) referred to.

THE facts of this case are sufficiently stated in the judgment of Edge, C.J.

Mr. G. T. Spankie, for the appellant.

Mr. Amiruddin, for the respondents.

EDGE, C. J.—This is an appeal from an order of the Subordinate Judge of Ghazipur of the 25th May, 1888, setting aside an auction-sale.

\* First Appeal, No. 133 of 1888, from an order of Maulvi Syed Akbar Hussain, Subordinate Judge of Ghazipur, dated the 25th May, 1888.

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| (1) L. R., 10 I. A., 25.    | (6) I. L. R., 8 Calc., 982.     |
| (2) I. L. R., 7 Calc., 34.  | (7) Weekly Notes, 1885, p. 304. |
| (3) I. L. R., 7 Cal., 466.  | (8) I. L. R., 9. All. 511.      |
| (4) I. L. R., 11 Calc., 74. | (9) I. L. R., 7. All. 289.      |
| (5) I. L. R., 7 Calc., 730. |                                 |

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The property in question was not property of the kind mentioned in the proviso to s. 269 of the Code of Civil Procedure: it was immoveable property.

The copy of the proclamation had been fixed up, on the 3rd December, 1887, in the court-house of the Judge who had ordered the sale. Without the consent in writing of the judgment-debtors, the sale was held on the 20th December, 1887; that is, within thirty days from the 3rd December 1887.

The judgment-debtors applied to the Subordinate Judge to set aside that sale, on the ground that it had been held before the expiration of thirty days from the date when the proclamation had been fixed up in the court-house of the Judge who had ordered the sale. There were other grounds alleged in support of the application, but they need not be considered now.

The Subordinate Judge set aside the sale on the principal ground to which I have referred. From the order of the Subordinate Judge the auction-purchaser brought this appeal.

There was no evidence that the judgment-debtors had suffered any substantial injury by reason of the sale having taken place within the thirty days from the date of the fixing up of the proclamation.

Mr. *Spankie* on behalf of the appellant contended that what had taken place was merely an irregularity within the meaning of s. 311 of the Code of Civil Procedure, and as there was no evidence that the judgment-debtors had sustained any substantial injury, the Subordinate Judge had no power to set aside the sale.

Mr. *Spankie* relied upon *Olpherts v. Mahabir Pershad Singh* (1), *Nathu v. Harbhuj* (2), *Mohunt Megh Lall Pooree v. Shih Pershad Madi* (3), *Kalytara Chowdhraïn v. Ramcoomar Goopta* (4), *Bonomali Mozumdar v. Woomesh Chunder Bundopadhya* (5), *Bandy Ali v. Madhub Chunder Nag* (6), and *Tripura Sundari v. Durga Churn Pal* (7). Mr. *Amiruddin* for the respondents contended that the

(1) L. R., 10 I. A., 25.

(2) Weekly Notes, 1885, p. 304.

(3) I. L. R., 7 Calc., 34.

(4) I. L. R., 7 Calc., 466.

(5) I. L. R., 7 Calc., 730.

(6) I. L. R., 8 Calc., 932.

(7) I. L. R., 11 Calc., 74.

holding of a sale in contravention of the provisions of s. 290 of the Code of Civil Procedure was more than irregularity within the meaning of s. 311; that in such a case the sale was an unauthorized and illegal sale, and that it was unnecessary to prove that any substantial loss had been sustained by the judgment-debtors by reason of a sale which had been illegally and not merely irregularly held.

Mr. *Amiruddin* relied upon *Bakhshi Nand Kishore v. Malak Chand* (1), *Banke Lal v. Muhammad Husain Khan* (2) and *Jasoda v. Mathura Das* (3).

Before discussing the authorities, it is advisable to consider whether s. 290 is merely directory as to procedure, or does not absolutely prohibit such a sale as was held here. That section is as follows:—"Except in the case of property mentioned in the proviso to s. 269, *no sale under this Chapter shall*, without the consent in writing of the judgment-debtor, *take place* until after the expiration of at least thirty days in the case of immoveable property, and of at least fifteen days in case of moveable property, calculated from the date on which the copy of the proclamation has been fixed up in the court-house of the Judge ordering the sale."

I do not see how the Legislature could have used more precise and apt language than that contained in s. 290 to prohibit absolutely the holding of such a sale as that in question here.

The sale in question was held in direct contravention of the express prohibition enacted in s. 290. It was a sale which not only was not authorized by any section of the Code of Civil Procedure, but was expressly prohibited by s. 290 of that Code, and was, in my opinion, an illegal sale, and not merely a sale in the publishing or conducting of which there was a material irregularity within the meaning of s. 311 of the Code. In my opinion it would be a misapplication of language to describe a sale which was illegal as merely irregular.

In *Olpherts v. Mahabir Pershad Singh* (4), *Mohunt Megh Lal Pooree v. Shib Pershad Madi* (5), *Kalytara Chowdhraim v. Ram-*

(1) I. L. R., 7 All., 289.

(3) I. L. R., 9 All., 511.

(2) Weekly Notes, 1887, p. 82.

(4) L. R., 10 I. A., 25.

(5) I. L. R., 7 Calc., 34.

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*coomar Goopta* (1), and *Tripura Sundari v. Durga Churn Pal* (2) the omissions and acts which were relied on were clearly irregularities in procedure and not illegalities.

In *Bonomali Mozumdar v. Woomesh Chunder Bundopadhya* (3) the facts of the case are not very clearly stated in the report, but I infer that one of the objections there was that the sale in that case had been held in contravention of Act X of 1877. In that case Field and Prinsep, JJ., expressed an opinion that the facts, if true, would have amounted to an irregularity within the meaning of s. 311 of that Act.

In *Bandy Ali v. Madhab Chunder Nag* (4) Macpherson and White, JJ., held that the judgment-debtor before them had consented to the sale in that case being held within and not after thirty days from the date of the proclamation of the notice; he had in fact purchased the property at the sale. It is not clear from the report whether or not those learned Judges considered that the holding of the sale within the thirty days was an irregularity.

In *Nathu v. Harbhuj* (5) my brother Straight certainly described and treated the holding of a sale of immoveable property without the consent in writing of the judgment-debtor within thirty days from the publication in the court-house of the Judge as "a grave irregularity." He found that there had been substantial injury. The case before him was apparently argued on the basis of s. 311 applying to it, and apparently it was not suggested in argument that the sale was prohibited and illegal. My brother Straight's attention does not appear to have been drawn to *Bakhshi Nand Kishore v. Mulak Chand* (6), in which Oldfield, J., and my brother Mahmood had set aside a sale, holding that infringement of the rule in s. 290 vitiated the sale and was an illegality vitiating the sale and something more than a material irregularity in publishing and conducting a sale to which s. 311 refers.

(1) I. L. R., 7 Calc., 466.

(2) I. L. R., 11 Calc., 74.

(3) I. L. R., 7 Calc., 730.

(4) I. L. R., 8 Calc., 932.

(5) Weekly Notes, 1885, p. 304.

(6) I. L. R., 7 All., 289.

In *Jasoda v. Mathura Das* (1), although I expressed myself in rather loose language in coupling an omission to comply with the requirements of s. 287 with an act which was in absolute contravention of s. 290, I then, however, expressed my thorough agreement with the judgment in *Bakhshi Nand Kishore v. Malak Chand* (2).

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It has been contended that unless s. 311 applies to the case of a sale held in contravention of s. 290, there is no other section which would enable a judgment-debtor to raise the objection, and such seems to have been the opinion of Field and Prinsep, JJ., in *Bonomali Mozumdar v. Woomesh Chunder Bundopadhyaya* (3).

The Legislature may not have contemplated that Judges and officers acting under the powers conferred upon them by the Code of Civil Procedure would, under cloak of such powers, order or permit sales which were expressly prohibited by s. 290, and consequently did not frame a section expressly dealing with sales held in contravention of the provisions of s. 290. Irregularities in procedure must occur as long as men are liable to make mistakes and such irregularities are expressly provided for.

I think, however, impliedly, although probably not expressly, the Code of Civil Procedure provides for objections like that in this case.

By s. 588 (16) an appeal is given from orders under "the first paragraph of s. 312, or s. 313, for confirming or setting aside or refusing to set aside a sale of immoveable property."

The first paragraph of s. 312 is as follows:—"If no such application as is mentioned in the last preceding section be made, or if such application be made and the objection be disallowed, the Court shall pass an order confirming the sale as regards the parties to the suit and the purchaser."

S. 588 therefore gives an appeal from an order confirming a sale made under the first paragraph of s. 312, whether an application under s. 311 had or had not been made to the Court which confirmed the sale. It consequently contemplates that objections on other

(1) I. L. R., 9 All., 511. (2) I. L. R., 7 All., 259.

(3) I. L. R., 7 Calc., 730.

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grounds than those mentioned in s. 311 may be taken to a sale and may be made grounds of appeal against an order confirming a sale.

S. 588 (16) provides expressly for an appeal against an order made under s. 313: consequently, I assume that the grounds other than those arising under s. 311 which may be made on appeal against an order under the first paragraph of s. 312, do not include grounds which might otherwise arise under s. 313. It would, to my mind, involve an absurdity and a scandal to the law to hold that a Court which had the carrying out of a sale under the Code must, unless substantial injury be proved, confirm a sale which was prohibited by the statute and which consequently was illegal.

In conclusion I am of opinion that the sale in this case was illegal, that it was open to the judgment-debtor to object to the sale on the ground of such illegality, and that this appeal should be dismissed and the order appealed against be affirmed with costs here and below. The appeal is dismissed, and the order below confirmed with costs under s. 575 of the Code of Civil Procedure.

BRODHURST, J.—In this case of execution of decree that was heard by the Subordinate Judge of Ghazipur on the 25th May 1888, the judgment-debtor took three objections to the sale.

The Subordinate Judge, for reasons that he gave, disallowed objections Nos. 1 and 2. The third objection was as follows:—  
“Thirty days had not elapsed to the affixing of the notification at the Court when the sale took place.”

The Subordinate Judge allowed this objection, recording the following remarks and order:—

“The third objection should certainly be allowed, because the sale-notification was affixed to the Court gate on 3rd December 1887, and the sale was held on 20th December, 1887; therefore, according to the ruling made in the case of *Jasoda v. Mathura Das* (1), on 23rd March 1887, the sale was improperly held and, in the absence of direct proof as to actual loss, should be set aside. Ordered that the sale held on the 20th December, 1887, be set

(1) I. L. R., 9 All., 511.

aside; the costs be charged to the decree-holder. The auction purchaser duly to get back the sale consideration."

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The case now comes before us as a first appeal from the Subordinate Judge's order, and the plea that has been taken and that is supported by Mr. *Spankie* is that "the Lower Court should not have set aside the sale without proof on the part of the judgment-debtor that he suffered substantial injury, and on this point no evidence was given."

The ruling referred to by the Subordinate Judge is reported not only in the Weekly Notes for 1887, p. 145, but also in the I. L. R., 9 All., 511. It is by the learned Chief Justice and my brother Mahmood, and they both appear at first sight to have followed a judgment delivered by Mr. Justice Oldfield and concurred in by Mr. Justice Mahmood in *Bakhshi Nand Kishore v. Malak Chand* (1).

The judgment is as follows:—The infringement of the rule in s. 290 of the Civil Procedure Code vitiates the sale. It is an illegality vitiating the sale, and is something more than a material irregularity in publishing and conducting a sale to which s. 311 refers. The sale is set aside and the appeal decreed with costs."

This judgment is very brief and it gives no reasons for the conclusions arrived at, but the meaning of it apparently is that non-fulfilment of the provisions of s. 290 of the Civil Procedure Code is something more than a material irregularity in publishing and conducting a sale to which s. 311 refer; that it is an illegality; that s. 311 is in nowise applicable to an illegality of the kind referred to, and that such an illegality of itself renders a sale void. The Legislature, however, has not enacted, as it might have done, that non-compliance or failure to fully comply with the provisions of s. 290 will of itself render a sale of immoveable property void, and if an illegality of the kind noticed is, as held in the rulings above-mentioned, even something more than a material irregularity as referred to in s. 311, the Legislature cannot but have intended to provide a prompt remedy for it also.

(1) I. L. R., 7 All., 289.



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In the case of *Jasoda v. Mathura Das* (1), the learned Chief Justice and my brother Mahmood delivered separate judgments. They both agreed in reversing the judgment of the Lower Court and in setting aside the sale of immoveable property which that Court had confirmed; but whilst the Chief Justice entirely approved of the judgment that was delivered by Mr. Justice Oldfield for himself and his learned colleague in the case of *Bakhshi Nand Kishore v. Malak Chand* (2), Mr. Justice Mahmood appears to have almost completely changed his opinion as to the law on the subject: for though in the first judgment he held that the infringement of the rule in s. 290 is an illegality vitiating the sale and something more than a material irregularity in publishing and conducting a sale to which s. 311 refers, in the later judgment he considers non-compliance with the provisions of s. 290 a material irregularity within the meaning of s. 311, and the only doubt he entertains is "whether material irregularities, such as those found in this case, are not in themselves sufficient within the meaning of the first paragraph of s. 311 of the Code of Civil Procedure to justify a Court in setting aside a sale, without inquiring whether such material irregularity had resulted in substantial injury within the meaning of the second paragraph of the section."

Mr. Justice Mahmood also observes:—"I think an argument might well be addressed in support of a contention that material irregularity is, *ipso facto*, fatal to a sale. I only wish to add on this point, with reference to the judgment of Mr. Justice Oldfield in the case above referred to, that I concurred without expressing any definite opinion whether a sale that infringes the rule of thirty days provided by s. 290 would not in itself be a sale subject to such a material irregularity as the earlier part of s. 311 contemplated. I have considered it necessary to say this with reference to the argument insisted upon before us on behalf of the respondent. The question in this form does not really arise, because, as the learned Chief Justice has said, it is impossible for us, as a Court of first appeal dealing with facts as well as law, to hold as a question of

(1) I. L. R., 9 All., 511.

(2) I. L. R., 7 All., 289.

fact, that a sale held under such conditions as the sale in this case, ever resulted otherwise than in a substantial injury to the judgment-debtor within the meaning of the last part of s. 311 of the Code of Civil Procedure. I concur with the learned Chief Justice."

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It is obvious that the judgment is on a point of law in conflict with the previous ruling of Oldfield and Mahmood, JJ., and with the judgment of the Chief Justice which follows that ruling.

I concur with my brother Mahmood in his later judgment that the infringement of the rule in s. 290 is a material irregularity within the meaning of s. 311, but I am unable to follow him in other parts of his judgment with regard to s. 311. His remarks relating to paragraph 2 of this section were probably made without having heard full arguments on the subject, and may be considered as *obiter dicta*.

Mr. *Spankie* by his references to the law and to the rulings of the Calcutta High Court on a precisely similar point and to a ruling of the Privy Council on an analogous question, has, I think, left but little room for doubt as to the meaning of the statute.

The case in point is a sale of immoveable property before the expiration of thirty days from its having been proclaimed, and it undoubtedly comes under s. 290, chapter XIX of the Civil Procedure Code. S. 311 is in the same chapter which is headed "of the execution of decrees," and this latter section is also in division (c) "Rules as to immoveable property."

The rule referred to in s. 290 is not invariable, for if the judgment-debtor gives his consent in writing, the sale of immoveable or moveable property may take place before the expiration of thirty days and fifteen days respectively. As, then, the Court can, with the written consent of the judgment-debtor and presumably for his advantage, order a sale of either description of property to take place before the expiration of the usual time, it is, I think, reasonable that the Court, when the judgment-debtor applies to it to set aside a sale on the ground that the full period referred to in s. 290, has through an oversight or otherwise not expired, should require

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the applicant to prove to its satisfaction that he has sustained substantial injury by reason of the irregularity.

I may here add that though the word "illegality" does not of course include an "irregularity," the latter word as used in s. 311 of the Civil Procedure Code is, I think, wide enough to include an illegality, and was probably there employed to avoid surplusage. In support of this opinion I notice that in Webster's Dictionary "irregularity" is first described as the state of being irregular, and that one of the meanings of irregular is given as "not in conformity to laws human or divine."

Some of the meanings of "material" are "important," "momentous," "essential," "of consequence," "not to be dispensed with."

The periods during which the sale of immoveable and moveable property are required to be proclaimed in the Judge's court-house are both stated in s. 290. If a sale of immoveable property has, owing to a miscalculation, taken place after the expiration of only twenty-nine days instead of thirty days, or if, as possible in this case, owing to confusion between the periods required for the two different kinds of property, that for moveable property had only just been exceeded, in either of these cases there would, in my opinion, have been a material irregularity in publishing the sale within the meaning of s. 311, but in neither case could the sale be set aside unless the applicant was able to prove to the satisfaction of the Court that he had sustained substantial injury by reason of the irregularity.

In my opinion then infringement of the rule in s. 290 of the Civil Procedure Code does not of itself vitiate a sale, but it is a material irregularity in publishing the sale which is referred to in s. 311 of the Code.

The meaning of s. 311 is, I think, quite clear. The two paragraphs of the section must be read and considered together: one is of no force without the other. If the Court, on application to set aside a sale of immoveable property, finds that there has been

a material irregularity in publishing or conducting the sale, it will then have to decide whether the applicant has sustained substantial injury in consequence of the material irregularity, for "no sale shall be set aside on the ground of irregularity, unless the applicant proves to the satisfaction of the Court that he has sustained substantial injury by reason of such irregularity."

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The view is supported by ruling of Division Benches of the Calcutta High Court in the following cases:—*Mohunt Megh Lal Pooree v. Shib Pershad Madi* (1), *Bonomali Mozamdar v. Woamesh Chunder Bundopadhyaya* (2), *Bandy Ali v. Madhub Chunder Nag* (3).

There are also several other rulings of the same High Court to a similar effect, as also a ruling of a Bench of this Court; but the only other ruling to which, I think, special reference is called for is that of their Lordships of the Privy Council in *Olpherts v. Mahabir Pershad Singh* (4).

The head-note of this judgment is as follows:—"In order to set aside an execution-sale under s. 311 of Act X of 1877, there must have been material irregularity in publishing or conducting it, and the applicant must further prove substantial injury in consequence of the irregularity. *Held*, that the not stating the amount of Government revenue in the proclamation of sale is an irregularity which may be properly (*i.e.*, in the Court of first instance) objected to; but if inadequacy of price is relied upon as substantial injury, such injury must be proved, under s. 311, to have occurred in consequence of the irregularity, and cannot be assumed to have so occurred by the Appellate Court in the absence of evidence."

The appeal to the Privy Council was from a judgment of the High Court of Calcutta, dated 22nd April 1881, reversing an order of the officiating Subordinate Judge of Tirhoot of the 25th September 1880, which disallowed the petitions of objection filed by the respondents.

(1) I. L. R., 7 Calc., 34.

(3) I. L. R., 8 Calc. 932.

(2) I. L. R., 7 Calc., 730.

(4) L. R., 10 I. A., 25.

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"The application was made under s. 311 of the Civil Procedure Code of 1877 'to set aside a sale of certain property in execution of a decree in consequence of irregularity.' The principal irregularity complained of was that no notification of the sale was properly published."

The sections of Act X of 1877 that are referred to in the judgment of their Lordships of the Privy Council are ss. 286, 287 and 311; those sections are reproduced word for word in ss. 286, 287 and 311 of Act XIV of 1882, and none of them has been modified by any subsequent enactment.

The question before the Privy Council was "solely in respect of the alleged irregularity in the proclamation of the sale. The applicant contended that the proclamation had not been published. He did not contend that in the proclamation the particulars were not properly described as required by the Act. He said in effect that no proclamation had been published." "When the case came before the High Court it was discovered that in the proclamations which were published the amount of revenue had not been stated." "The objection, if it had been properly taken in the first instance, would have been good to this extent that not stating the amount of revenue was an irregularity; but even then there would have been something more to be proved than the mere irregularity: it would have been necessary to go on and show that substantial damage had been sustained by the applicant in consequence of that irregularity. No evidence was given upon that subject before the lower Court, though by s. 311 the *onus* lay upon the applicant to prove to the satisfaction of the Court that he had sustained substantial damage in consequence of the irregularity, nor was there any finding of the lower Court upon it, because the question was never raised.

"The High Court having held that the non-statement of the amount of revenue in the proclamation was an irregularity, proceeded to try the question whether the irregularity had caused substantial injury to the applicant. They say:—'But it may be reasonably supposed that the non-specification of the Government revenue in the sale proclamations published is one of the causes

which caused the diminution in the price.' There was no evidence at all on the subject. It appears to their Lordships that the High Court could not, without evidence and upon a mere supposition, properly find that the non-statement of the revenue in the proclamation did cause any injury to the applicant by causing an inadequate price to be bid at the sale.

" Their Lordships think that it was too late for the applicant to make the objection ; and even if it were not too late for him to make the objection before the High Court, there was no evidence to justify the High Court in arriving at the conclusion that there was an inadequacy of price occasioned by the non-statement of the revenue in the sale-proclamation. Under these circumstances their Lordships will humbly advise Her Majesty to reverse the decision of the High Court and to affirm the decision of the first Judge."

In the above case before the Privy Council there was an infringement of the rule in s. 287 of the Code of Civil Procedure, which their Lordships held would entitle the decree-holder or any person whose immoveable property had been sold to apply to the Court to set aside the sale on the ground of a material irregularity in publishing or conducting it. S. 290 like s. 287 is in subdivision (a), general rules, and both those sections as well as s. 311 are in division G " of sale and delivery of property " in Chapter XIX of the Civil Procedure Code. The terms of ss. 287 and 290 are almost equally peremptory, and having regard to those sections and to the above-mentioned ruling of the Privy Council, I am of opinion that infringement of the rule in s. 290 of the Civil Procedure Code does not of itself vitiate the sale; that it is " a material irregularity " in publishing the sale which is referred to in s. 311 of the Code, and that no Court can, without evidence and upon a mere supposition, properly find that the sale of immoveable property before the expiration of thirty days, the time required by s. 290 of the Civil Procedure Code, did cause an injury to the applicant by causing an inadequate price to be bid at the sale.

Under these circumstances I would allow the appeal and remand the case, under s. 562 of the Civil Procedure Code, to the lower Court

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1889 for re-trial of the third objection in accordance with the above remarks.

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*Appeal dismissed.*

*Before Mr. Justice Mahmood.*

RUPCHAND AND OTHERS (PLAINTIFFS) v. SHAMSH-UL-JEHAN (DEFENDANT).\*

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March 14.

*Pre-emption—Conditional decree—Deposit of purchase-money—Appeal—Computation of time allowed for payment—Civil Procedure Code, s. 214.*

In a suit for pre-emption, the decree of the Court of first instance was conditional upon payment of the purchase-money within one month from its date. After this period had expired without payment, the defendants appealed from the decree. The appeal was dismissed and the decree affirmed, and no fresh period for payment was expressly allowed by the decree of the appellate Court.

*Held* that the decree of the appellate Court must be taken to have incorporated the terms of the decree of the Court of first instance, that the period of one month allowed for payment of the purchase-money must be calculated from the date of the appellate Court's decree, and that payment by the decree-holder within one month from that date was in time. *Shohrat Singh v. Bridgman* (1), *Luchman Persad Singh v. Kishan Persad Singh* (2), *Gobardhan Das v. Gopal Ram* (3), *Noor Ali Chowdhuri v. Koni Meah* (4), and *Daulat v. Bhukandas Manekchand* (5) referred to.

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi *Madho Prasad*, for the appellants.

Mr. *Dwarka Nath Banerji*, for the respondent.

MAHMOOD, J.—The facts of the case are the following :—

The plaintiffs decree-holders in this case, appellants before me, obtained a decree for pre-emption from the Court of first instance on the 12th September, 1887, which directed that the pre-emptor was to obtain possession of the pre-empted property on payment of a sum of Rs. 1,000 within one month of the date of the decree, and on failure of such payment the decree would stand cancelled ; in

\* Second Appeal, No. 956 of 1888, from a decree of T. R. Redfern, Esq., District Judge of Bareilly, dated the 29th March 1888, confirming a decree of Babu Ganga Prasad, Munsif of Bareilly, dated the 14th December 1887.

(1) I. L. R., 4 All., 376.

(3) I. L. R., 7 All., 366.

(2) I. L. R., 8 Calc., 218.

(4) I. L. R., 13 Calc., 13.

(5) I. L. R., 11 Bom., 172.

other words, it was a decree which aimed at being in conformity with the terms of s. 214 of the Civil Procedure Code.

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On the 28th October, 1887, the purchasers, who are defendants-respondents before me, preferred an appeal to the District Judge, but the appeal was dismissed on the 25th November, 1887, by an order confirming the decree of the first Court.

Meanwhile the purchase-money had not been deposited, but after the passing of the appellate Court's decree, the pre-emptors decree-holders, appellants before me, deposited the money in Court on the 15th December, 1887.

To the deposit, however, objections were taken by the judgment-debtors, purchasers, upon the ground that the decree by its very terms had become unavailable to the decree-holders pre-emptors, since their deposit was not made within the period allowed by the decree. Both the Courts have concurred in accepting this view, and the application for execution of the 5th December, 1887, was therefore rejected.

It is from this order passed upon the application, namely, the learned Judge's order of the 29th March, 1888, that this second appeal has been preferred, and the main contention which has been pressed upon me by Mr. *Madho Prasad* for the appellants is that, under the Full Bench ruling in *Shohrat Singh v. Bridgman* (1) and in *Luchman Persad Singh v. Kishun Parsad Singh* (2) and the interpretation put upon those rulings in *Gobardhan Das v. Gopal Ram* (3), the only decree which could be executed is the appellate decree, and that it must be taken to have incorporated the terms of the decree of the first Court as forming part of the appellate decree even to the extent of calculating the period of one month allowed by the first Court's decree as incorporated in the appellate Court's decree. The learned pleader for this contention relies upon the ruling of the Calcutta High Court in *Noor Ali Chowdhuri v. Koni Meah* (4), which was followed by the Bombay High Court in *Daulat v. Bhukandas Manehchand* (5), and argues that these cases

(1) I. L. R., 4 All., 376.

(3) I. L. R., 7 All., 366.

(2) I. L. R., 8 Calc., 218.

(4) I. L. R., 13 Calc., 13.

(5) I. L. R., 11 Bom., 172.



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are so similar to the principle involved in this case that the deposit of the 5th December, 1887, for the purpose of the one month within which it was to be made, must be taken to be calculated from the date of the appellate Court's decree, which is the only decree capable of execution. The learned pleader also relied upon the rulings of this Court in *Sheikh Ewas v. Mokuna Bibi* (1) and in *Ram Sahai v. Guya* (2) which followed the earlier case.

I am of opinion that the contention urged on the part of the appellants is sound. Whatever views may have been suggested by the consideration that the original decree of the 12th September, 1887, had been passed fixing one month from the date of the decree within which the purchase-money was to be deposited, and that the period had terminated before the appeal was filed in the appellate Court, thus rendering the mandatory part of the decree ineffective for purposes of enforcement of possession, I cannot forget that the effect of the Full Bench ruling, that the only decree that can be executed is the appellate decree, is entirely in favour of Mr. *Madho Prasad's* contention. The cases *Noor Ali Chaudhuri v. Koni Meah* (3) and *Daulat v. Bhukandas Manekchand* (4) are also in favour of Mr. *Madho Prasad's* contention, and I hold that the deposit of the 5th December, 1887, was within time.

In the result I decree the appeal, and setting aside the order of the lower Court, remand the case under s. 562 of the Civil Procedure Code for such further proceedings as may be necessary for the purpose of executing the decree.

*Cause remanded (5).*

(1) I. L. R., 1 All., 132.

(3) I. L. R., 13 Calc., 13.

(2) I. L. R., 7 All., 107.

(4) I. L. R., 11 Bom., 172.

(5) See *Shoo Prasad Lal v. Thakur Rai* (N.-W. P., H. C., Rep., 1868, p. 254, Full Bench) and *Chhidda v. Imdad Husain* (Weekly Notes, 1888, p. 4).

## EXTRAORDINARY ORIGINAL CIVIL.

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March 21.*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.*

IN THE MATTER OF THE WEST HOPETOWN TEA COMPANY, LIMITED.

*Company—Application for registration—Act X of 1866 (Indian Companies Act)  
—Application received while Act X of 1866 was in force—Delay in office  
of Registrar—Certificate purporting to be issued under Act X of 1866,  
but issued after repeal thereof by Act VI of 1882—Act I of 1868 (General  
Clauses Act), s. 6—“Proceedings commenced”—Company held to have been  
registered under Act X of 1866—Practice—Costs.*

Prior to the 1st May, 1882, the Secretary and Manager of a projected Company (which was to be limited by shares) applied to the Registrar of Joint Stock Companies for a certificate of incorporation of the Company, intending that it should be registered under Act X of 1866, the Indian Companies Act then in force, and forwarded the memorandum and articles of association with the necessary stamp-fees, and did everything that was required to be done by or on behalf of the Company to obtain a certificate under that Act. No order was passed by the Registrar upon this application until the 6th May, and owing to delay, for which the applicants were not responsible, registration was not effected and the certificate was not issued until the 3rd July, when a certificate was given purporting to be granted in pursuance of Act X of 1866. Meanwhile, on the 1st May, 1882, the Indian Companies Act (VI of 1882) repealing Act X of 1866 came into force, s. 28 of which provided that every share in any Company should be deemed to have been taken and held subject to payment of the whole amount thereof in cash, unless the same had been otherwise determined by a contract in writing filed with the Registrar. No such provision existed in Act X of 1866. The shareholders of the Company paid nothing upon their shares in cash; but had agreed (not in writing filed with the Registrar) that, in consideration of certain property conveyed by them to the Company at the time of its formation, fully paid-up shares were to be allotted to them. Subsequently, the Company having gone into liquidation, the Official Liquidator sought to make the shareholders contributories to the assets of the Company as the holders of shares upon which nothing had been paid, with reference to s. 28 of the Indian Companies Act VI. of 1882.

*Held* that the proceedings for obtaining registration of the Company and a grant of a certificate of such registration, commenced, within the meaning of s. 6 of the General Clauses Act, when the memorandum and articles of association were received in the Registrar's office in April, 1882, while Act X of 1866 was in force; that therefore the repeal of that Act by Act VI of 1882 did not affect those proceedings; that consequently the Company must be taken to have been incorporated under the former Act; and that the provisions of s. 28 of Act VI of 1882 not being applicable, the shareholders were not liable to be placed on the list of contributories as not having paid the full amount of their shares.

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TER OF THE  
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COMPANY,  
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The Official Liquidator's application to place the shareholders upon the list of contributories having been *bona fide* made in the liquidation, the Court ordered that the costs of each side should be paid as a first charge out the estate.

THIS case was transferred by the High Court, under s. 25 read with s. 647 of the Civil Procedure Code, to its own file from the Court of the District Judge of Saharanpur, and the circumstances connected with the transfer are stated in the report at I. L. R., 9 All., 180. The facts of the case were as follows:—

On or about the 13th June, 1860, a Company called the West Hopetown Tea Company, Limited, the object of which was the cultivation of tea at a plantation called the West Hopetown Estate near Dehra Dun, was registered under Act XIX of 1857, the Indian Companies Act then in force. Its nominal capital was Rs. 1,09,000 in 18½ shares of Rs. 6,000 each. Early in 1882 it was determined to re-construct the Company, the principal reason assigned being that the shares were too large to be readily saleable. On the 11th March, 1882, an extraordinary general meeting of the shareholders was called for the purpose of considering a scheme of re-construction, and certain resolutions were passed, and were confirmed by another extraordinary general meeting held on the 27th March. At the latter meeting all the shareholders of the Company (nine persons) were present, either in person or by proxy. The resolutions passed were as follows:—

"1. That the Company be wound up voluntarily, and that Mr. C. G. Vansittart be and hereby is appointed liquidator for the purpose of such winding up.

"2. That the following scheme of re-construction be, and the same is hereby, approved, *viz.*, that a new Company be incorporated under the Indian Companies Act X of 1886, as a Company limited by shares, by the name of the West Hopetown Tea Company, Limited, with a capital of Rs. 3,00,000 divided into 3,000 shares of Rs. 100 each, with power to increase, and having power to acquire and take over the business, property and liabilities of this Company; that of the capital, Rs. 2,80,700 be allotted to the shareholders of this Company, being at the rate of twenty-three fully paid up shares in the new Company for every Rs. 1,000 invested by shareholders in this Company, and the balance of the 3,000 shares be issued by the Directors when and as they think fit; that the said liquidator be and is hereby authorized, pursuant to s. 175, Indian Companies Act, X of 1886, to sell to such new Company upon the above terms the property of this Company, but so that the new Company shall also undertake all the liabilities of this Company, and shall pay the costs of winding up;

and that the said liquidator be and is hereby authorized to execute and do all such things as may be necessary for carrying out the above scheme into effect."

On the 8th April, 1882, the following letter was sent:—

"No. 185.

"WEST HOPETOWN TEA CO., LIMITED, DEHRA DUN.

8th April 1882.

"To the Registrar of Joint Stock Companies, Allahabad,

"SIR,—I enclose herein the following papers:—

"(i) Duly stamped and executed memorandum and articles of association of the West Hopetown Tea Company, Limited.

"(ii) Treasury receipt for Rs. 225 paid into the Dehra Treasury, as required under s. 17, Act X of 1866.

"(iii) Treasury receipt, *vide* my No. 175 of 1st instant.

"Kindly return the receipts to me after you have done with them, and grant me a certificate of incorporation.

Yours, &c.,

C. G. VANSITTART,

*Secretary and Manager."*

Upon this letter the following memorandum, dated the 29th April 1882, and initialled R. B. C. (initials of the Head Assistant of the Registration Office, Allahabad) was endorsed:—

"Mr. Vansittart has sent for registration the memorandum of association and articles of association of the West Hopetown Tea Company; and has paid into the Dehra Dun Treasury on account of registration fees Rs. 225, but we only require Rs. 155, according to the following calculation:—

"TABLE B., ACT X OF 1866.

	Rs.
For a capital of Rs. 20,000 ... ..	40
Above Rs. 20,000 up to Rs. 50,000, Rs. 20 for each Rs. 10,000 ...	60
Above Rs. 50,000 up to Rs. 1,00,000, Rs. 5 for each Rs. 10,000 ...	25
Above Rs. 1,00,000, Rs. 1 for each Rs. 10,000, <i>i.e.</i> , Rs. 3,00,000 in this case ... ..	20
<b>Total</b> ...	<b>145</b>
For registering articles of association ... ..	5
Certificate of registration ... ..	5
<b>Total</b> ...	<b>155</b>

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"I do not know how this is to be remedied. We must give a certificate of registration. In this certificate we shall have to state the amount paid. If we enter Rs. 225 and then refund the excess paid, the Company will hold a certificate as having paid a larger sum than they actually did. So that the refund, if it be given, must be made before the Company is registered."

After the 29th April, no further steps were taken in the Registration Department until the 6th May, when the Officiating Registrar of Joint Stock Companies made the following order:—

"Refund the excess and then register, showing the proper fees."

Between these two dates, that is, on the 1st May 1882, the Indian Companies Act, VI of 1882, repealing Act X of 1866 came into force, having received the assent of the Governor-General on the 24th February. After a further delay of nearly a fortnight, the Head Assistant sent the following letter:—

"No. 40.

19th May 1882.

"To C. Vansittart, Esquire, Secretary and Manager, West Hopetown Tea Co., Limited.

SIR,—In reply to your No. 185, dated 8th ultimo, I have the honour to point out that you have paid Rs. 70 too much on account of registration fees. The capital of your Company is Rs. 3,00,000. The fees payable by you are as follows, calculated according to Table B. of Act X of 1866:—

	Rs.
For the first Rs. 20,000 ... ..	40
Above Rs. 20,000 up to Rs. 50,000, Rs. 20 for each Rs. 10,000 ...	60
Above Rs. 50,000 up to Rs. 1,00,000, Rs. 5 for each Rs. 10,000 ...	25
Above Rs. 1,00,000, Rs. 1 for each Rs. 10,000 ... ..	20
<b>Total</b> ... ..	<b>145</b>
For registering articles of association ... ..	5
For certificate of registration ... ..	5
<b>Total</b> ... ..	<b>155</b>

"You should apply to the Collector for a refund of Rs. 70. When you have obtained the refund, I shall feel obliged by your intimating the fact to me, as until then I shall not be able to register the papers sent by you."

This letter was signed by both the Head Assistant and the Officiating Registrar. On the 23rd June, 1882, the following answer was returned :—

“WEST HOPETOWN,  
June 23rd, 1882.

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“To the Registrar, Joint Stock Companies, Allahabad.”

“SIR,—With reference to your No. 40, dated the 19th ultimo, I now beg to advise you that the Rs. 70 overpaid has been refunded to me by the Dehra Dun Treasury, and I beg to thank you for pointing out the error.

Yours faithfully,

C. G. VANSITTART,

*Secretary and Manager.”*

In reply, the Head Assistant, on the 8th July, 1882, forwarded a certificate of registration to the following effect :—

“In the office of the Registrar of Joint Stock Companies, North-Western Provinces and Oudh.

*In the matter of the West Hopetown Tea Company, Limited.*

“I do hereby certify that, pursuant to Act X of 1866 of the Legislative Council of India, entitled the Indian Companies Act, memorandum of association and articles of association have been this day filed and registered in my office, and that the said Company has been duly incorporated, and is a company limited by shares pursuant to the provisions of the said Act.

“3rd July, 1882, at Allahabad.

T. BENSON,

*“Assistant Registrar of Joint Stock Companies, N.W. P. and Oudh.”*

Clause 3 of the Memorandum of Association, stating the objects for which the Company was established, contained the following sub-clause :—

“(a) To purchase or otherwise acquire and undertake all the business, property and liabilities of the West Hopetown Tea Company, Limited (now in liquidation), and of any other Company, together with the manufactories, land, buildings, plant, stock-in-trade, chattels and effects used in the said business, and the contracts subsisting in relation thereto, and the good-will thereof.”

The following clauses in the articles of association had reference to the same subject :—

“4. The Board of Directors may, upon such terms and conditions as they think fit, purchase and acquire all the business, property and liabilities of the West Hope-

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town Tea Company, Limited (now in liquidation), together with the manufactories, lands, buildings, plant, stock-in-trade, chattels and effects used in the said business, and the contracts subsisting in relation thereto, and the good-will thereof.

"12. Shares in the Company shall be allotted to such person and in such manner as the Directors shall think fit; but the Directors shall, in pursuance of an agreement made with the liquidator of the West Hopetown Tea Company, Limited (now in liquidation), allot, as therein provided, the number of shares specified in the agreement.

"13. Fully paid up shares taken by the members of the West Hopetown Tea Company, Limited (now in liquidation), in payment for the business and property, &c., of the said Company shall, for all purposes, be considered as shares on which the whole amount due has been paid in cash; and no holder of any such share shall in respect thereof be liable to pay any future sum thereon."

It was stated at the hearing of the case that an agreement to the effect mentioned in clauses 12 and 13, and in conformity with the resolution passed by the shareholders of the old Company on the 11th and 27th March, 1882, was executed; but neither the original nor any copy was produced; no trace of it was to be found at the office of the Registrar of Joint Stock Companies, and it was not stated who were the parties to its execution. Apart from the resolutions above referred to, and clause 13 of the articles of association, there was no contract of the kind mentioned in s. 28 of the Indian Companies Act, VI of 1882.

In March, 1886, the principal creditor of the Company, the Delhi and London Bank, applied, under s. 128 (d) of the Act, that the Company should be wound up, and the application was granted without opposition. The winding-up proceedings were initiated in the Court of the District Judge of Saharanpur, but were transferred to the High Court as already stated (1). Owing to various causes, which need not be stated, the list of contributories did not come before the Court for settlement until April, 1888. The official liquidator, applying s. 28 of Act VI of 1882, entered upon the list all those shareholders who had been members of the old Company and who, in exchange for the property and business of that Company and in accordance with clause 13 of the articles of association of the new Company, had received shares purporting to be fully paid up, as having paid nothing upon their shares, and

(1) I. L. R., 9 All. 180.

as consequently liable to contribute to the Company's assets to the full value of those shares, upon the principle laid down in *Fothergill's Case* (1), *Spargo's Case* (2), *Andress's Case* (3), *White's Case* (4), *Pagin and Gill's Case* (5), and other cases decided upon the corresponding s. 25 of the English Companies Act of 1867. The shareholders objected that the Company must be held to have been incorporated, not under Act VI of 1882, but under the former Companies Act, X of 1866, which contained no provision similar to s. 28 of the Act of 1882, and under which, therefore, contracts for the payment of shares otherwise than in cash were valid.

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Mr. A Strachey, for the official liquidator, contended that at the time when the certificate of registration was issued, the 8th July, 1882, Act X of 1866 was no longer in force, and that the Registrar had no power to grant a certificate under a repealed Act, or otherwise than under Act VI of 1882. It could not be said that, prior to the repeal, which took effect on the 1st May, 1882, there had been any "proceedings commenced" within the meaning of s. 6 of the General Clauses Act (I of 1868), so as to save the application of Act X of 1866. All that had occurred was that an application for registration was made on the 8th April, 1882, but no order or action of any kind was taken upon that application until after the 1st May, and there was no authority for the proposition that a mere application to a public officer, without any action on the part of that officer himself, fell within the description of "proceedings commenced." The nearest case was where some order had actually been passed, prior to the repeal, upon such application: *Vidya Ram v. Chandra Shekaram* (6). No action can be taken for the first time under a repealed statute, as distinguished from steps consequent upon, and for the purpose of maintaining the operation of, action previously taken. A step taken for the first time is a separate proceeding. [He also referred to *Shivram Uda Ram v. Kondiba* (7), *Ratansi Kalianji's Case* (8), and *R. v. Denton* (9)].

(1) L. R., 8 Ch. 270.

(2) L. R., 8 Ch. 407.

(3) L. R., 8 Ch. D. 126.

(4) L. R., 10 Ch. D. 720;  
12 Ch. D. 511.

(5) L. R., 6 Ch. D. 681.

(6) I. L. R., 4 Bom. 163.

(7) I. L. R., 8 Bom. 340.

(8) I. L. R., 2 Bom. 148.

(9) 21 L. J. M. C. 208.



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[EDGE, C. J.—According to your argument, the proceedings could not have commenced until the certificate of registration was granted. But that was what determined the proceedings, and cannot be the act from which the commencement of the proceedings is to date.]

We say that the proceedings commenced with the Registrar's order of the 6th May, 1882, directing registration after the refund of the excess payment. That was subsequent to the repeal of Act X of 1866. Next, the letter of the 23rd June, 1882, from the Secretary and Manager, which was written nearly two months after Act VI of 1882 had come into force, at a time when the writer knew nothing had yet been done by the Registrar, was substantially a fresh application. If not a fresh application, the writer must be presumed to have known that the law had been altered since his letter of the 8th April, and his renewal of the application in June was equivalent to acquiescence in its being governed by the new law. [He referred to the observations of Jessel, M. R., in *Hasluck v. Pedley* (1)].

The Hon. *T. Conlan*, Mr. *H. Vansittart*, and Mr. *J. C. Mulaly*, for the shareholders, contended that s. 6 of the General Clauses Act was applicable, and also s. 2(b) and s. 251 of Act VI of 1882. The certificate of registration showed, upon its face, that it was granted under Act X of 1866, and the resolutions of the 11th and 27th March, 1882, the memorandum and articles of association, all showed a clear intention that the Company should be incorporated under Act X of 1866 only. The Registrar could have no power, upon an application for incorporation under Act X of 1866, to issue a certificate under Act VI of 1882.

Mr. *A. Strachey*, in reply.

EDGE, C. J.—This is an application made on behalf of the liquidator of the West Hopetown Tea Company, Limited, now in liquidation, to settle a list of contributories, and to place on that list of contributories some of the original shareholders and some

(1) L. R., 19 Eq. 271.

other shareholders who have taken from the original shareholders by assignment or otherwise. A Company had been registered under Act XIX of 1857 bearing the same name as the present Company. That Company had been registered on or about the 13th June, 1860. It was considered, advisable for certain *bond fide* reasons which we need not now go into, that the Company which had been registered under Act XIX of 1857 should be reconstructed, and that the share capital should be divided into shares of smaller amount. On the 11th March, 1882, the shareholders of the then Company accordingly resolved to reconstruct the Company, and on the 27th March that resolution was confirmed at an extraordinary meeting of the shareholders. The shareholders agreed amongst themselves in what proportion the shares of the new Company should be allotted, such shares representing the then existing interest of the shareholders in the assets of the Company. In pursuance of that resolution, a memorandum and articles of association were prepared and stamped, and were dated the 8th April, 1882, and on that day were forwarded by the Secretary and Manager of the then existing Company to the Registrar of Joint Stock Companies at Allahabad for registration. The Secretary's letter was as follows :—

" Dehra Dun, 8th April 1882.

" To the Registrar, Joint Stock Companies, Allahabad.

" Sir,—I enclose herein the following papers :—

" 1.—Duly stamped and executed memo. and articles of association of the West Hopetown Tea Company, Limited.

" 2.—Treasury receipt for Rs. 225 paid into the Dehra treasury, as required under s. 17, Act X of 1866.

" 3.—Treasury receipt, *vide* my No. 175, dated 1st instant.

" Kindly return the receipts to me after you have done with them and grant me a certificate of incorporation."

That application was received by the Registrar in due course of post. The question then arose in the office of the Registrar as to the amount of the stamp which should be paid, and ultimately it was ascertained that the stamp-fee which had been paid exceeded by Rs. 70 the correct stamp-fee, and an order was made on the 6th

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May, 1882, to refund the excess. The result was that prior to the 1st May, 1882, everything that was required to be done by or on behalf of the new Company to obtain its certificate of registration under Act X of 1866 was done. They had, in fact, paid Rs. 70 in excess of the stamp which was required. Owing to delay in the office of the Registrar, and to no cause for which the applicants for registration and grant of certificate could be held responsible, the Company was not registered and the certificate was not issued until the 3rd July, 1882. On the 3rd July, 1882, the certificate of incorporation was issued under the hand of the Assistant Registrar of Joint Stock Companies of the North-Western Provinces and Oudh. It in terms purported to be granted in pursuance of Act X of 1866.

It is quite clear that the application for registration and for grant of certificate was made whilst Act X of 1866 was in force. That application was for registration and the grant of a certificate under Act X of 1866 and not under the Act of 1882, which came into force on the 1st May in that year. The Act which the parties desired the Company to be registered under was the Act which was in force at the time when they made the application, namely, Act X of 1866, and they never desired or requested to be registered under the Act of 1882. If we are to look at the certificate itself, it purports to be a certificate of registration under Act X, 1866, and not of registration under Act VI of 1882. We can have no doubt that the Assistant Registrar in issuing that certificate intended it to be a certificate of registration under Act X of 1866.

The shareholders in the old Company which was registered under Act XIX of 1857, as I have said, agreed to transfer their interest in the concern to the new Company in consideration of the paid-up shares issued to them. No contract in writing was filed with the Registrar of Joint Stock Companies under s. 28 of Act VI of 1882 at or before the issue of such shares. That is admitted on all hands here. The contention before us on behalf of the liquidator is that Act X of 1866 having expired on the 1st May, 1882, the Company must be deemed to have been registered and

the certificate of registration granted under Act VI of 1882 and not under Act X of 1866. If that contention on behalf of the liquidator were a good contention in law or in fact, the respondents before us would be liable to be placed upon the list of contributories; on the other hand, if that contention fails, it is not contested before us on behalf of the liquidator, that the respondents before us, or any of them, would be liable to be placed on the list of contributories in the winding-up of the Company.

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It appears to us that in deciding this case we must have regard to Act I of 1868. By s. 6 of that Act it is enacted:—"The repeal of any Statute, Act or Regulation, shall not affect anything done or any offence committed, or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation."

Act VI of 1882 was, so far as Act X of 1866 was concerned, a repealing Act within the meaning of s. 6 of Act I of 1868. It is contended on behalf of the liquidator that the application for registration and for a certificate of registration to be granted made to the Registrar of Joint Stock Companies and received by him whilst Act X of 1866 was in force, was not a commencement of proceedings within the meaning of s. 6 of Act I of 1868. On behalf of the liquidator it is further contended that no proceedings can be considered to have commenced within the meaning of s. 6 of Act I of 1868, unless and until an official or judicial order of some kind has been passed in a proceeding by an executive or judicial officer. With that contention I do not agree. It appears to me that in ordinary plain English, the proceedings for obtaining registration of this new Company, and a certificate of registration, had commenced when the application together with the memorandum and the articles of association stamped and properly drawn up were received in the office of the Registrar in April 1882. According to the contention on behalf of the liquidator, there was no commencement of proceedings at all in this case in the ordinary meaning of the term, inasmuch as no official order was made on the application until the grant of certificate. The granting of the certificate of the registration of the Company which determine

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the proceedings cannot be the act from which the commencement of the proceedings is to date. I am clearly of opinion that the proceedings for obtaining registration and a grant of a certificate of such registration of the new Company had commenced within the meaning of s. 6 of Act I of 1868 on the 12th April 1882, and whilst Act X of 1866 was in force, and that s. 6 of Act I of 1868 applies to this case. In this view I am of opinion that we should disallow this application which has been made on behalf of the liquidator.

The only question that remains is the question of costs. I am of opinion that this is an application which was *bond fide* made in this liquidation, and that it is an application with regard to which we should not saddle the official liquidator personally with the payment of costs. The reasonable and proper order to be made is that the costs of each side be paid as a first charge out of the estate, and that order we, in disallowing the application, make.

STRAIGHT, J.—I am entirely of the same opinion. The application for registration was made while Act X of 1866 was in force. It is therefore to be inferred that the persons who made that application contemplated and desired that the Company should be registered under that statute. But for the delay which took place in the registration office, the registration would have been granted while the Act under which registration had been asked for was in operation, but by reason of that delay, the certificate was not granted until that Act was no longer in force. Nevertheless, the certificate, which was granted on the 3rd July, was granted, as it expressly states, under Act X of 1866; and, in my opinion, we should not, unless constrained to do so, hold that it was granted under Act VI of 1882. I am entirely of the same opinion as the learned Chief Justice, that, for the reasons he has fully given, not only was a proceeding commenced under Act X of 1866, as interpreted by s. 6 of the General Clauses Act (I of 1888), but was carried through and completed by issue of the registration certificate of the 3rd July, 1882, in the manner contemplated by that statute. I am of the same opinion as regards the question of costs.

*Application rejected.*

## CRIMINAL REVISIONAL.

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April 1.*Before Mr. Justice Straight.*

QUEEN-EMPRESS v. PAIAMBAR BAKHSH.

*Practice—Contempt of court—Act XLV of 1860 (Penal Code), s. 228—Criminal Procedure Code, ss. 480, 537.*

The procedure laid down in s. 480 of the Criminal Procedure Code should be strictly followed. The provisions of the section should be applied then and there, at any rate before its rising, by the Court in whose view or presence a contempt has been committed which it considers should be dealt with under s. 480.

Where a Magistrate in whose presence contempt was committed took cognizance of the offence immediately, but, in order to give the accused an opportunity of showing cause, postponed his final order for some days,—*held* that such action, though it might be irregular, was not illegal, and, as the accused had not been in any way prejudiced, was covered by s. 537 of the Criminal Procedure Code.

*Held* also that, under the circumstances, it was doubtful whether there was any necessity for the Magistrate to postpone the final order until the accused had had an opportunity of showing cause against it, and that he should have directed the detention of the accused, and dealt with the matter at once or before his rising.

THE petitioner in this case was convicted by the Deputy Magistrate of Allahabad of contempt of court under s. 480 of the Criminal Procedure Code, and sentenced to a fine of Rs. 50, or, in default, one week's simple imprisonment. He was a mukhtar, and on the 1st August, 1888, was conducting the case of an accused person then being tried by the Magistrate for an offence punishable under s. 9 of Act XII of 1882. During the argument in the case, the petitioner appeared to have lost his temper with the Inspector of the Customs Department, who was prosecuting on behalf of the Crown, and spoke to him in such a way that the Magistrate interposed and checked him. He then repeatedly said excitedly, "Produce it, produce it," i.e., produce the law on the subject, and continued to argue the case in an excited manner. The Magistrate having observed that any reasonable argument would receive due attention, the petitioner replied, "Perhaps, perhaps," in a manner implying a doubt of the Court's impartiality. After continuing for some time, the Magistrate desired him to address

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the Court in a proper manner and to desist from talking nonsense ("behuda guftagu"), or further measures would be taken with him. To this the petitioner replied, "*Bahut se adalat roz ate hain*"—many a Court comes every day. The Magistrate thereupon made a note of the expression used, and requested the petitioner to explain what he meant by it, but he declined to reply on the ground that no formal proceeding had been drawn up. He also refused to sign his statement to this effect. The Magistrate then prepared a proceeding embodying the facts just stated, and while this was being done the petitioner left the Court, and, though searched for, could not be found up to the time when the Court rose. Next day (the 2nd August) he applied for a copy of the proceeding before giving his reply. The Magistrate declined to grant a copy, and, on the next day, the reply was filed. On the 6th August the petitioner applied to have the proceedings stayed until he could apply for a transfer under the provisions of ss. 526 and 526A of the Criminal Procedure Code. The Magistrate declined to stay proceedings, and, on the 9th August, proceeded to convict and sentence the petitioner as above stated.

The petitioner appealed to the Sessions Judge, who dismissed the appeal and confirmed the conviction and sentence. It was contended on behalf of the appellant that the Magistrate could not legally call upon him to reply until a formal proceeding had been recorded, that he did not refuse to sign the statement which he had made, that he did not leave the Magistrate's Court or conceal himself, that the Magistrate had taken evidence against him in his absence, that the Magistrate ought not to have refused to stay proceedings, that, under s. 480 of the Criminal Procedure Code, the Magistrate was bound to pass sentence on the day when the offence was committed, and that the offence was committed under provocation. In the course of his judgment the Sessions Judge observed:—

"The Magistrate was not, in my judgment, bound to pass sentence on the same day. He was bound to take cognizance of the matter the same day, and did so. He would have been justified in taking time to consider the sentence if the appellant had replied,

and it was desirable that he should not pass his order in the heat of the moment. The appellant's refusal to file a reply put him in a difficulty. I do not know that he was called upon to wait for a reply, but there was nothing illegal in doing so, and the accused was clearly not prejudiced by that course. It is argued that the Magistrate ought, when the matter was not or could not be concluded in one day, to have proceeded according to s. 482 of the Criminal Procedure Code. But a Court is required to resort to the provisions of that section only when it considers that the person accused should be imprisoned otherwise than in default of payment of fine. It is not open to the accused to force a Court to have recourse to those provisions by refusing or delaying to reply.....I feel no doubt that the words and bearing and the whole attitude of the appellant were insolent and disrespectful from the beginning. He disregarded the Court's admonition to urge his point with less heat and excitement, implied an offensive doubt as to the Court's impartiality, and said finally (using his own version of what he said), "Many Courts have come and gone," words of obviously disrespectful import, implying that he had seen a good many Courts come and go, and that therefore he was not particularly impressed by the dignity of the particular Court before which he stood. The appellant was no doubt guilty of a gross and continuous contempt of Court."

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The petitioner applied to the High Court for revision of the orders of the Magistrate and the Sessions Judge. The first ground stated in the petition for revision was, "Because the learned Magistrate not having elected to follow the procedure laid down by s. 480 of the Criminal Procedure Code, the conviction and the sentence passed upon the petitioner are illegal."

Mr. *W. M. Colvin*, for the petitioner.

The *Public Prosecutor* (Mr. *G. E. A. Ross*), for the Crown.

STRAIGHT, J.—In my opinion the first ground taken for revision, though it has some force in it and has deserved consideration, cannot prevail.



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I agree with Mr. Colvin that the provisions of s. 480 of the Criminal Procedure Code were intended to be applied *then and there*, or at any rate before its rising by the Court in whose view or presence a contempt has been committed, which it considers could be properly and adequately dealt with under that section, and that they did not ordinarily contemplate such action as was adopted by the Deputy Magistrate in the present case. But while it may be his procedure was irregular, to pronounce it illegal is quite another thing, and knowing as I do the difficulty native magisterial officers must necessarily at times be placed in to preserve order in their Courts, I should not be disposed to take that view unless coerced to do so by the terms of the statute. It is perfectly clear that the postponement of his final orders in the matter was adopted by the Deputy Magistrate for the purpose of affording the petitioner an opportunity of showing cause why such order should not be made, though I doubt if under the circumstances disclosed there was any necessity for the Deputy Magistrate to take that course. Anyhow I cannot hold that the petitioner in any way was prejudiced by the Deputy Magistrate's action, and as I think at most it amounted to no more than an irregularity of procedure, I think it was cured by s. 537 of the Criminal Procedure Code. The first ground for revision therefore fails. I may add, however, that Courts when resorting to a use of s. 480 of the Criminal Procedure Code would do well to strictly follow the procedure therein laid down. Has the Deputy Magistrate in the present instance directed the detention of the petitioner and dealt with the matter at once or before his rising, this application would probably have never been made. Upon the findings of fact recorded by the learned Judge in appeal which I must accept, and the statement of what actually occurred as recorded by the Deputy Magistrate, I cannot say that there was no contempt of the kind covered by s. 228 of the Penal Code, at any rate in the nature of prolonged and offensive interruption to the Magistrate's getting on with the case he was engaged in trying. I cannot, however, help thinking that the incident was inflamed somewhat by the unfortunate remark of the Deputy Magistrate in the course of which the word "*behuda*" was used, with what

context is not quite clear. At the same time the petitioner would have been better advised when time was given him for reflection, had he apologised and expressed his regret for any apparent, but as he maintained not intended, discourtesy or interruption to the Court. Looking to all the circumstances, I decline to disturb the order of the learned Judge confirming that of the Deputy Magistrate; but as I do not regard the conduct of the petitioner as of a very gross or serious character, I reduce the fine to Rs. 20, or, in default, one day's simple imprisonment. If realised, the difference between that and the Rs. 50 fine inflicted will be returned.

*Conviction affirmed, sentenced varied.*

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BAKSH.

## APPELLATE CIVIL.

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April 27.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*

DILDAR FATIMA (PLAINTIFF) v. NARAIN DAS AND ANOTHER  
(DEFENDANTS).\*

*Court-fee—Suit to obtain a declaratory decree—Suit to set aside a summary order—Consequential relief—Prayer to have property released from attachment—Act VII of 1870 (Court-fees Act), sch. (ii), No. 17 (i) and (ii).*

*Held* that the Court-fee payable on the plaint and memorandum of appeal in a suit under s. 283 of the Civil Procedure Code praying (a) for a declaration of right to certain property, and (b) that the said property might be released from attachment in execution of a decree, was Rs. 10 in respect of each of the reliefs prayed.

THIS was a reference by the Officiating Registrar as taxing-officer of the High Court, under s. 5 of the Court-fees Act (VII of 1870). The order of reference was as follows :—

“ In this case there seem to be two prayers :—

“ (a) For a declaration of right to certain property.

“ (b) That the said property may be released from attachment.

“ The former taxing-officer held that consequential relief was sought, and that therefore an *ad valorem* stamp was due. The

\* Miscellaneous application in S. A. No. 259.

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appellant's counsel has drawn my attention to the following rulings :—

DILDAR  
FATIMA  
v.

“ *Fatima Begum v. Suhkram* (1).

NARAIN DAS.

“ *Manraj Kuari v. Maharajah Radha Prasad Singh* (2).

“In both these cases the prayer was formally to set aside an order passed on an objection to an attachment, and it was held that this came under sch. ii, art. 17 of the Court-fees Act, and should bear a Rs. 10 stamp.

“The latter of these two cases, however, shows that the additional prayer cannot be treated as mere surplusage, but must be stamped or considered in the valuing in accordance with its nature.

“In this case it will be observed that the form of the prayer is somewhat different; it is not to set aside an order, but to release the property. The result in each case would doubtless be the same, but the formal prayer is different.

“In the Full Bench ruling of *Ram Prasad v. Sukhdai* (3) a prayer that property “be exempted from sale” was held to involve consequential relief and an *ad valorem* fee.

“This case seems analogous to the present one, and were it not for a Bombay case to which I will refer, I should clearly hold with Mr. Thomson that the consequential relief was sought.

“The case, however, of *Dayachand Nemchand v. Hemchand Dharamchand* (4) gives some ground for supposing that the actual result, not the wording of the prayer, is to be considered. Thus a prayer to restore an attachment is held to be stamped as a suit to set aside a summary order.

“If the Court-fees Act, as a fiscal Act, is to be construed as far as possible in favour of the subject, it might be held as indicated by the Bombay ruling that where there has been an attachment and an unsuccessful objection followed by a regular suit under s. 283 of the Civil Procedure Code, that suit however worded is one to set

(1) I. L. R., 6 All., 341.

(2) I. L. R., 6 All., 466.

(3) I. I. R., 2 All., 720.

(4) I. L. R., 4 Bom., 515.

aside a summary order, in other words, that the result, not the formal wording of the suit, should be considered.

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"If consequential relief be deemed as prayed for, the deficiency is Rs.  $70 \times 3 = 210$ .

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"If a declaratory decree *plus* an order to set aside a summary order is deemed as prayed for, the deficiency is Rs.  $10 \times 3 = 30$ .

"As it is important to have a clear ruling, and I am inclined to think there is much to be said in favour of the latter view, I refer the question to the Court."

The case came before Brodhurst, J., who referred it to a Division Bench.

Mr. *Hamidullah* for the appellant.

STRAIGHT and TYRRELL, JJ.—A court-fee of Rs. 10 must be paid in respect of each of the reliefs prayed.

*Before Mr. Justice Brodhurst and Mr. Justice Mahmood.*

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UMDA AND OTHERS (DEPENDANTS) v. UMRAO BEGAM (PLAINTIFF).\*

December 11.

*Mortgage, usufructuary—Suit for sale by usufructuary mortgagees—Suit not maintainable—Act IV of 1882 (Transfer of Property Act), s. 67 (a).*

Under s. 67 (a) of the Transfer of Property Act (IV of 1882), a usufructuary mortgagee, whose possession has not been disturbed, cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. *Chowdhri Umrao Singh v. The Collector of Moradabad* (1), *Dulli v. Bahadur* (2), *Ganesh Koor v. Deedar Buksh* (3), *Venkatasami Subramanga* (4), and *Jhabbu Ram v. Girdhari Singh* (5) referred to.

The facts of this case were as follows:—

One Musammat Khanam Jan executed a usufructuary mortgage of a house in favour of one Inaitullah Khan for a sum of

\* Second Appeal No. 383 of 1887, from a decree of Maulvi Saiyid Muhammad Khan, Subordinate Judge of Moradabad, dated the 2nd December, 1886, confirming a decree of Maulvi Zakir Husain Khan, Munsif of Moradabad, dated the 30th August, 1886.

(1) S. D. A., N.-W. P. 1869, p. 13. (3) N.-W. P. H. C. Rep., 1873, p. 123.

(2) N.-W. P. H. C. Rep., 1875, p. 55. (4) I. L. R., 11 Mad. 83.

(5) I. L. R., 6 All., 289.

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Rs. 300 repayable after four years. The mortgage was executed on the 25th September, 1874, and under its terms the mortgagee was placed in possession. The mortgagee Inaitullah, on the 11th November 1875, executed a deed of mortgage whereby he sub-mortgaged his mortgagee's rights in lieu of Rs. 300 for a term of two years ten months and twelve days, at the end of which the money borrowed was to be repayable. The second mortgage was executed in favour of Muzaffar Khan who was no party to this litigation.

The aforesaid Muzaffar Khan, by a sale-deed executed on the 19th December, 1878, conveyed his rights under the deed of the 11th November, 1875, to his wife, Musammat Umrao Begam, who was the plaintiff-respondent in the present case.

The original mortgagor, Musammat Khanam Jan, had a brother named Sadik Ali, and on her death the equity of redemption descended by inheritance upon the aforesaid Sadik Ali. After the demise of Musammat Khanam Jan, Sadik Ali executed a sale-deed of his equity of redemption in favour of the ladies, Musammats Umda and Imtiazan. This was done on the 15th January, 1886.

The present suit was instituted by Musammat Umrao Begam with the object of recovering the mortgage-money by bringing the property to sale and it was based upon the sub-mortgage of the 11th November, 1875, and also the terms of the original usufructuary mortgage of the 25th September, 1874. The defendants were Musammat Umda and Musammat Akbari and Piare Khan, the heirs and representatives of Musammat Imtiazan.

The suit was defended upon various grounds, but those grounds were disallowed by both the Courts below, and those Courts decreed the claim for recovery of the money by bringing the property to sale in default of payment within one month.

The defendants appealed to the High Court. The questions raised by the grounds stated in the memorandum of appeal were (1), whether the usufructuary mortgage of the 25th September,

1874, could be so enforced as to bring the property to sale, and (2) if, so whether, with reference to the terms of the sub-mortgage of the 11th November, 1875, under which the plaintiff claimed as sub-mortgagee, she was entitled to maintain such a suit ?

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Munshi *Madho Prasad* for the appellants.

Munshi *Kashi Prasad* and Mir *Zahur Husain* for the respondent.

BRODHURST and MAHMOOD, JJ. (after stating the facts, as above, continued)—We have heard the learned pleaders for the parties upon both these points, but we are of opinion that the answer to the first point is sufficient for dismissal of the suit. Reading the terms of the original Hindustani of the mortgage-deed of the 25th September, 1874, which is the origin of the title asserted by the plaintiff, it seems to us perfectly clear that the deed is an ordinary deed of *rahn-bil-kubs*, that is to say, a deed of usufructuary mortgage involving possession of the mortgagee as the method and form of the security given to him for the loan advanced by him to the mortgagor. Further, it is admitted before us that, under the terms of that document, possession was actually given to the original mortgagee, Inaitullah Khan, under whom Musammat Umrao Begam claims to have the mortgagee's rights. There is no allegation that either the original mortgagee, Inaitullah Khan, or his sub-mortgagee, Muzaffar Khan, or the present plaintiff, Musammat Umrao Begam, have ever been unlawfully disturbed in their possession of the mortgaged house.

There is no contention of this kind, and what we have to consider is the question whether, under such circumstances, the plaintiff, even if she represented all the rights of the original mortgagee, Inaitullah Khan, could maintain such an action, which practically is a suit to secure a remedy such as that which appertains to an ordinary hypothecation, and is not contemplated by the relation created by the usufructuary mortgage.

In considering this question we have been referred by Mr. *Madho Prasad* for the appellants to the ruling of the late Sadar Diwani

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Adalat, N.-W.-P., in *Chowdhri Umrao Singh v. The Collector of Moradabad* (1) and also to a ruling of a Division Bench of this Court in *Dulli v. Bahadur* (2). In the latter of these two cases it was held that "a suit on a deed of usufructuary mortgage to bring the property to sale for the realization of the amount due under the deed, where the property was not hypothecated in the deed to secure the debt, was unmaintainable."

The case was decided by Pearson and Spankie, JJ., and is mainly relied upon by Mr. *Madho Prasad* for the defendants-appellants. On the other hand, Mr. *Kashi Prasad*, for the respondents, relies upon another Division Bench ruling of this Court in *Ranee Ganesh Koor v. Deedar Buksh* (3) and also on a ruling of the Madras High Court in *Vinkatasami v. Subramanya* (4), and relying upon these judgments, the learned pleader urges that even a usufructuary mortgagee in possession of the mortgaged property, without such possession being in any manner disturbed by the mortgagor, is entitled after the expiry of the period for which the money was borrowed, namely, the time of the mortgage, to recover such money by an action such as this, namely, an action which aims at recovery of money by bringing the mortgaged property to sale, much in the same manner as in the case of a hypothecation or simple mortgage as defined in clause (b), s. 58 of the Transfer of Property Act IV of 1882.

In dealing with the contention urged before us, we do not think it is necessary for us to enter into any minute discussion as to the various reasons upon which the rulings which have been cited before us proceed. We are of opinion that, whatever conflict of decision there may have existed, even if such conflict is understood to have existed, the law, as embodied in s. 67 of the Transfer of Property Act, represents the old law as it stood before the enactment came into force, and further that, even if the enactment itself is to be taken as representing that which the statute has enacted, the provisions of that statute are applicable to this case. Mr. *Kashi*

(1) S. D. A., N.-W. P., 1959, p. 131. (3) N.-W. P., H. C. Rep., 1873, p. 128.

(2) N.-W. P. H. C. Rep., 1976, p. 55.

(4) I. L. R. 11 Mad., 88.

*Prasad* has indeed urged that the original mortgage in the case being dated the 25th September, 1874, and the sub-mortgage of the 11th November, 1875, being also anterior to the passing of the Transfer of Property Act IV of 1882, that enactment has no bearing upon the fate of the decision of this case.

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It seems to us that the contention so addressed is analogous in principle to that which a Full Bench of this Court had to consider in *Ganga Sahai v. Kishen Sahai* (1), where the learned Judges went fully into the consideration of the various sections of which the most important is the effect of the saving clause in s. 2 of the Transfer of Property Act. The effect of the decision was that the learned Judges held that where a mortgage is to be enforced after the coming into force of the Transfer of Property Act IV of 1882, whether such mortgage was anterior to such enactment or not, the date of deciding whether such enactment applies or not is the date of the suit and not the date of the mortgage. This view was adopted by a Full Bench of the Calcutta High Court in *Bhobo Sundari Devi v. Rakhal Ghander Bose* (2), and the broad effect of these rulings is that, although a mortgage may be anterior to the passing of the Transfer of Property Act, yet when a person comes into court and claims remedy under a mortgage, the new procedure of the enactment would apply. We are, therefore, of opinion that s. 67(a) of the Transfer of Property Act is applicable to the case, namely, that, even if the plaintiff is entitled to fall back upon the terms of the original mortgage of the 25th September, 1874, the mortgage being of a usufructuary character, she has no right to come into court when her possession remained undisturbed, to claim either foreclosure or sale such as that she asks for in this action. In reference to this point, we may refer also to the *ratio decidendi* of a ruling of this Court in *Jhabbu Ram v. Girdhari Singh* (3), to which case one of us was a party, and where the question was considered as to the circumstances under which a usufructuary mortgagee could sue for recovery of the mortgage-money. The case is not on all-fours with the present case, and need not be considered further

(1) I. L. R., 6, All., 262.

(2) I. L. R., 12, Calc., 583.

(3) I. L. R., 6, All., 289.



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than by saying that it fully recognises the law to be that the usufructuary mortgagee cannot, whilst his possession remains undisturbed, convert such usufructuary mortgage into hypothecation, or seek foreclosure or sale by an action such as this.

We are, therefore, of opinion that the suit and the relief prayed for in it were unmaintainable and that the courts below should have dismissed the suit altogether.

This view renders it unnecessary for us to consider the second point which has been pressed before us by Mr. *Madho Prasad*, namely, whether or not a sub-mortgagee, such as the present plaintiff, may possibly be under the terms of the deed of the 11th November, 1875, could, in any case, be entitled to maintain such an action. We are anxious to say that we express no opinion upon the matter, and because, taking the case on behalf of the respondent, she has no right for maintaining an action for bringing the property to sale.

For these reasons we decree the appeal, and setting aside the decrees of both the courts below, dismiss the suit *in toto* with costs in all the courts.

*Appeal allowed.*

*Before Mr Justice Straight.*

1889  
January 23.

GIRDHARI AND OTHERS (DECREE-HOLDERS) v. SITAL PRASAD  
(JUDGMENT-DEBTOR).\*

*Limitation—Execution of decree—Sale in execution set aside—Application by purchaser for refund of purchase-money—Accrual of right to apply—Civil Procedure Code, s. 315—Act XV of 1877 (Limitation Act), sch. ii, No. 178.*

A suit by a judgment-debtor whose *sir* land had been sold in execution of a decree, to have the sale declared void and illegal on the ground that the *sir* was incapable of sale, was decreed on appeal by the High Court on the 13th June, 1884. On the 11th June, 1887, the purchaser at the sale applied, under s. 315 of the Civil Procedure Code, for a refund of the purchase-money.

*Held*, that the limitation applicable was that provided by art. 178 of sch. ii of the Limitation Act (XV of 1877); that the right to apply accrued on the

\*Second Appeal No. 357 of 1888 from a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Mainpuri, dated the 22nd December, 1887, confirming a decree of Munshi Girraj Kishor Dutt, Munsif of Etah, dated the 5th November, 1887.

passing of the High Court's decree, and the application was, therefore, not barred by limitation; but that, looking to the great delay there had been on the part of the applicant, he should not be allowed any costs.

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The facts of this case are stated in the judgment of the Court.

Munshi *Juala Prasad* for the appellants.

Munshi *Sukh Ram* for the respondent.

STRAIGHT, J.—This is a second appeal in execution from an order of the Subordinate Judge of Mainpuri, dated the 22nd December, 1887, in affirmance of an order of the Munsif of Etah made in reference to an application of the appellants for a refund of certain purchase-monies which they had paid in execution of a decree. It appears that one Ram Gopal held a decree against one Khiali Ram, and in execution of that decree, the decree-holder first of all brought to sale the zamindari rights of Khiali Ram in the particular village. The proceeds of that sale were insufficient to fully satisfy the decree; and on a subsequent date, the rights and interests of Khiali Ram in the *sir* attaching to his zamindari were put up for sale and purchased by Girdhari, Kallu and Kundan, the appellants, upon the 21st November, 1881, and the sale was confirmed in their favour. Subsequently, Khiali brought a suit in the Civil Court to have it declared that the *sir* right purchased by the appellants were incapable of sale under the law, and that they had bought no more than a bag of wind. He succeeded in the first Court, which apparently made some order in its decree directing a return to the appellants, who were defendants in that suit, of the purchase-money paid in respect of the sale which was declared to be a void sale. Ultimately the case came in second appeal to this Court before my brothers Oldfield and Brodhurst; and on the 13th June 1884, they passed a decree sustaining the decision of the first Court declaring the sale to be void and illegal; but they modified the decision of the first Court in so far as it directed in execution of that decree the return of the purchase-money to the appellants. On the 11th June, 1887, the appellants applied, under s. 315 of the Civil Procedure Code, to the Court which passed the original decree against Khiali Ram and ordered the sale of the 21st November, 1881,

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for the refund of the purchase-money which they had paid for the *sir* right. It may also be mentioned that the appellants had then instituted a suit to recover from the decree-holder the amount of the purchase-money paid by them, but that suit was, so I am informed, dismissed upon the ground that it was not maintainable, because the remedy provided by law was by an application in the execution department.

The question now is, what article of the limitation law is applicable to the present application for refund. Certainly not art. 172, because that is concerned with the application to set aside the sale on a particular ground, which this application is not. There is no other article that I can find in terms specifically applicable; it, therefore, seems to me that it falls within the general category provided for by art. 178, and that limitation must be taken to count from the date the appellants had accrued to them a right to make their present application. I think in this case I am taking a reasonable view when I say that until it was specifically declared by this Court in affirmance of the decision of the Lower Courts that the sale of the 21st November, 1881, passed no saleable interest to the appellants—the auction-purchasers at a sale at that date,—it cannot be said that a right to apply for a refund accrued to them.

Under these circumstances, I do not think that the application of the appellants of the 11th June, 1887, was barred by time, and accordingly, reversing the decisions of the Courts below, I direct that the Munsif of Etah restore this application to his file of pending applications and dispose of it according to law. But looking to the very great delay that there has been on the part of these appellants and to the fact that they waited till within two days of the expiry of the three years from the date of the decision of this Court, I should certainly not allow them any costs in this matter. Each party will pay their own costs.

*Appeal allowed.*

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

BANNO BIBI AND OTHERS (PETITIONERS) v. MEHDI HUSAIN AND  
OTHERS (OPPOSITE PARTIES).\*

1889  
February 16.

*Practice—Letters Patent—N. W. P., s. 10—Appeal from single Judge—  
“Judgment”—Interlocutory order—Order refusing leave to appeal in formâ  
pauperis—Civil Procedure Code, ss. 588, 591, 632.*

Under ss. 588 and 591 of the Civil Procedure Code no appeal lies, under s. 10 of the Letters Patent for the High Court for the North-Western Provinces, from an order of a single Judge refusing an application for leave to appeal *in formâ pauperis*. *Achaya v. Rutnavelu* (1) and *in re Rajagopal* (2) followed.

*Hurriah Chunder Chowdhry v. Kali Sunderi Debi* (3) distinguished.

THE facts of this case are sufficiently stated in the judgment of Edge, C.J.

Pandit *Moti Lal Nehru*, for the appellants.

Mr. *W. M. Colvin*, for the respondents.

EDGE, C.J.—This is an appeal under s. 10 of the Letters Patent from an order of our brother Straight refusing an application for leave to appeal *in formâ pauperis*. Mr. *Colvin* on behalf of the respondent has taken a preliminary objection that the appeal will not lie. Ordinarily, and unless there is something in the Code of Civil Procedure to take away the appeal, an appeal lies under s. 10 of the Letters Patent from a judgment or order, not being a sentence or order passed or made in a criminal trial, of one Judge of this Court. On behalf of the appellant Mr. *Moti Lal* has cited a judgment of the Privy Council in *Hurriah Chunder Chowdhry v. Kali Sunderi Debi* (3), and he has referred more particularly to a passage at p. 494, where it is said—“It only remains to observe that their Lordships do not think that s. 588 of Act X of 1877, which has the effect of restricting certain appeals, applies to such a case as this, where the appeal is from one of the Judges of the Court to the full Court.” I do not understand their Lordships there to have held that s. 588 of the Civil Procedure Code does not apply at all to appeals attempted to be brought to the Full Court from an order passed by a Judge of the Court. I think

\* Appeal No. 25 of 1888 under s. 10, Letters Patent.

(1) I. L. R., 9 Mad., 253.

(2) I. L. R., 9 Mad., 447.

(3) I. L. R., 9 Cal., 482.

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they were restricting their observations to the case before them. In that case the question arose from a so-called order of Pontifex, J., in respect of an order of the Privy Council for execution. Mr. Justice Pontifex considered that the decree as it then stood was not susceptible of execution, and refused to transmit the decree to the Court below. An appeal was preferred under s. 15 of the Letters Patent of the Calcutta High Court. Two of the Judges of that Court differed from the Chief Justice, the Chief Justice thinking that Mr. Justice Pontifex's order was merely ministerial, and the other two Judges apparently thinking that his proceeding was more than ministerial. Mr. Justice Mitter pointed out that Pontifex, J., ought to have acted under s. 244 of Act X of 1877. Those two Judges considered that an appeal lay under s. 15, Letters Patent.

With regard to that case my observation is this, that apparently Mr. Justice Mitter considered that Mr. Justice Pontifex must have taken action or ought to have acted under s. 244 or 245 of the then Code. If Mr. Justice Pontifex was acting under those sections, it was quite obvious that an appeal would lie. If he was not acting under those execution sections of the Code, but under s. 610 of the Code, I have difficulty in seeing how s. 588, Civil Procedure Code, could have applied to what he did. The term "an order" as defined in the present Code of 1882 would hardly be applicable to any direction which the Judge might give under s. 610, Civil Procedure Code. In the present Code an order is defined as "the formal expression of any decision of a Civil Court which is not a decree as above defined."

As I understand it, under s. 610, all that a Judge has to do is to transmit the decree and give such direction as may be required, &c. I come to the conclusion that the case in the Privy Council does not apply to this case. On the other hand, we have two cases in the Indian Law Reports, 9 Madras, which I think bear directly on the present case.

The first of those cases is *Achaya v. Ratnavelu* (1), in which Mr. Justice Muthusami Ayyar, in a very careful and elaborate judgment

(1) I. L. R., 9 Mad., 253.

shows how the Code of Civil Procedure has affected s. 15 of the Letters Patent. The next case is *in re Rajagopal and others* (1) in which the present Chief Justice and Mr. Justice Parker held that an order passed under s. 592 of the Code of Civil Procedure, rejecting an application to appeal as a pauper, is not appealable. That was an appeal from an order of one of the Judges of that Court, who rejected an application to appeal as a pauper. In my opinion the correct view of the law as applicable to such cases is to be found in the two cases of the Indian Law Reports, 9 Madras, and is a view which we ought to follow. I may observe that considerable difference exists between s. 588 of the present Code and s. 588 of Act X of 1877, which was the Act under consideration in the case before the Judicial Committee. In my opinion this appeal should be dismissed with costs.

TYRRELL, J.—I am entirely of the same opinion (2).

*Appeal dismissed.*

(1) I. L. R., 9 Mad., 447.

(2) This appears to be the first decision of this High Court upon the effect of ss. 588, 591 and 632 of the Civil Procedure Code, on s. 10 of the Letters Patent. In the other High Courts, a similar construction has been placed on the corresponding clauses of their Letters Patent. The following cases were decided when the Civil Procedure Code of 1859 was in force, s. 363 of which prohibited appeals from interlocutory orders:—*Apcar v. Howah Bys* (1 Ind. Jur. N. S., 337); *Kumara Upendra Krishna Deb Bahadur v. Nabin Krishna Bose* (3 B. L. R., O. C., at p. 117); *Raka Bibi v. Khaja Mahomed Umar Khan* (4 B. L. R., A. C., 10); *The Justices of the Peace for Calcutta v. The Oriental Gas Company* (8 B. L. R., 433); *Sombai v. Ahmedbhai Habibbhai* (9 Bom. H. C. Rep. 396); *Mowla Buksh v. Kishen Pertab Sahi* (I. L. R., 1 Calc., 102); *Somasundaram Chetti v. The Administrator-General* (I. L. R., 1 Mad., 148). The effect of these cases was (a) that appeals under the clauses of the other Letters Patent corresponding with s. 10 of the Letters Patent for this High Court were treated as subject to the provisions of the Code

of 1859 generally; (b) that the term "judgment" in the clauses under consideration was understood in the sense of a final adjudication or "decree" as defined in s. 2 of the present Code. The only ruling in which the term was applied in a sense comprehending orders of every description, final or interlocutory, and without reference to the provisions of the Code, was *DeSouza v. Coles* (Mad. H. C. Rep., 384), which has never been followed to its full extent.

The cases decided (in addition to those mentioned by Edge, C. J.) since the coming into force of the Code of 1877 and in particular s. 588 making certain interlocutory orders appealable are *Howard v. Wilson* (I. L. R., 4 Calc., 231); *Ebrahim v. Fakhrunnissa Begam* (I. L. R., 4 Calc., 531); *Kali Kristo Paul v. Ramchunder Nag* (I. L. R., 8 Calc., 147), and *Navicahoo v. Narotamdas Camdas* (I. L. R., 7 Bom., 5). Their effect, stated shortly, appears to be that a decision, to be a "judgment" within s. 10 of the Letters Patent, either must be a "decree" as defined in s. 2 of the present Code, or if an order not amounting to a decree, must be one of those specified in s. 588.

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*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

February 21.

**KHAIRATI LAL (PETITIONER) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (OPPOSITE PARTY).\***

*Act X of 1870 (Land Acquisition Act), s. 55—Part of property acquired for public purposes—Owner desiring that the whole shall be acquired—Right of owner not restricted to small or confined areas—Convenience of owner not the test.*

The Local Government having appropriated for public purposes under the Land Acquisition Act (X of 1870) some of the out-houses attached to a dwelling-house, and part of the compound in which they were situate, without taking the house with its other out-houses or appurtenances or the rest of the compound, the owner objected, under s. 55 of the Act, that the Government should take the whole of such property or none.

*Held*, applying to s. 55 the interpretation placed by the Courts in England upon the corresponding s. 93 of the Land Clauses Consolidation Act (8 & 9 Vic., c. 18), that the section was applicable, and the objection must be allowed. *Grosvenor v. The Hampstead Junction Railway Company* (1), *Cole v. The West London and Crystal Palace Railway Company* (2), and *King v. The Wycombe Railway Company* (3) referred to.

*Held* also that the rule was not in England restricted to small or confined areas, and that the test was not whether the part appropriated could be severed from the rest of the property without inconvenience to the owner.

THIS appeal arose out of a reference by the Collector of Meerut to the District Judge, under s. 15 of the Land Acquisition Act (X of 1870).

Certain buildings were appropriated by Government for the purposes of a railway line in the city of Meerut. The buildings formed out-houses of a bungalow in cantonments standing upon land the property admittedly of the Cantonment Committee.

The compensation offered by the Collector was at one time Rs. 825, at another Rs. 1,717, calculated exclusive of the 15 per cent. to be paid under s. 42 of the Act. The owner declined this offer, claiming—

(1) With reference to s. 55 of the Act, that Government should appropriate the whole of the buildings appertaining to the bungalow,

\* First Appeal No. 163 of 1887 from a decree of A. Sells, Esq., District Judge of Meerut, dated the 27th June, 1887.

(1) 26 L. J., N. S., Ch. 731.

(2) 28 L. J., Ch. 767.

(3) 29 L. J., Ch. 462.

including the bungalow itself, and setting the total value at Rs. 35,672-15. 1889

(2) That, in the event of the liability of Government to take the whole not being conceded by the Court, the owner was entitled to a sufficient sum to enable him to erect the buildings anew, and any other amounts that might be held due under s. 24.

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THE SECRETARY OF  
STATE FOR  
INDIA IN  
COUNCIL.

On the 11th May, 1887, the District Judge passed the following order :—

“The land which has been appropriated, 3 bighas 18 biswas 12 biswansis in extent, forms a portion of a large compound, attached to a house within cantonment limits, the land is cantonment land admittedly, and the ownership of it vests in the Cantonment Committee. All that belongs to the claimant is the buildings upon the land, comprising a pukka house with its appurtenant out-houses. The appropriation does not interfere with the house itself, this is left at some 25 yards beyond the boundary of the appropriated land, but includes a portion of the cook-room, the sweeper’s house, stables, latrines, some tiled servants’ houses, and a small portion of the garden, and also an old tomb.

“For the claimant it is contended that the whole of the buildings, including of course the main residence, must be taken. It is urged that, in accordance with rulings of the English Courts (s. 92 of the English Act being parallel with s. 55 of Act X of 1870), the appropriation as made by the Collector is the appropriation of ‘part’ only of a ‘house,’ and that accordingly the owner wishing it, Government is bound to take the whole of the buildings or none at all. Special stress is laid upon the Court’s remarks in the case of *King v. The Wycombe Railway Co.* (1) (quoted at p. 47 of Ingram’s Law of Compensation), in the case of the *Government of St. Thomas’ Hospital v. Charing Cross Railway Co.* (quoted as above), and upon the authority also of English Judges, it is urged that the ‘test’ to be applied, in order to decide whether these buildings are or are not “part” of the house, is whether the portions acquired would pass on a conveyance of the house as part of the appurten-

(1) 29 L. J. Ch. 402.



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ances. Now, deciding strictly in accordance with the letter of this test, unquestionably the buildings now appropriated would form 'part' of the house. But it must be borne in mind that the circumstances of property of this description are different in India from those of property of the same kind in England, and especially that in the present case, the land itself is not the claimant's property. In England, such properties are, as a rule, very limited in extent; they are compact, and, as a rule, all available space is utilized for some special purpose, and the taking of any particular portion may be presumed under such conditions to place the owner in difficulty, or put him to great inconvenience; and in many cases, in England, another test appears to have been applied, *viz.*, whether the plot or building to be appropriated is essential to the convenient occupation of the house, or whether, without great inconvenience to the owner of the house, it can be severed from the remainder. Unquestionably the stables and cook-houses and servants' huts are essential to the convenience of the occupant of the house, but I am of opinion that this fact would not necessarily make it incumbent upon Government to appropriate the whole of the buildings in the compound, unless it is shown that these could not *without inconvenience* be erected elsewhere. These buildings are of small value as compared with the main residence, and are usually of a kind readily demolished and as readily replaced—and here also the peculiar conditions of the claimant's occupation of the land are entitled to consideration. The land is not his own; it is simply a temporary loan as it were from Government, given for the purpose of building a residence, and so long as *without inconvenience* the buildings appropriated can be replaced by fresh buildings upon other sites, I am of opinion that the owner cannot force the appropriation of the whole. Now, the enclosure or compound is of very large extent, and a large portion of it would seem to have been invariably let out for cultivation. The area of 17 bighas is far beyond the requirements of any bungalow, and is far beyond that of the majority of compounds in Meerut, or any other station. This large area cannot certainly be considered as a necessary adjunct to the house, or as necessary for the convenience even of the occupant, and there is

ample space available within the area for the construction of the out-houses now proposed for removal. I have myself visited the place and am certainly of opinion that the removal and re-erection of the buildings in another part of the compound would in no way inflict a hardship upon the owner, and I accordingly hold it is not incumbent upon the Government to appropriate the whole of the buildings within the area of the 17 bighas, and that s. 55 of Act X does not bar this partial appropriation, so long as adequate compensation is paid so as to enable the buildings to be reconstructed in another part of the enclosure."

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The District Judge proceeded to assess the compensation due to the claimant in respect of such buildings only as were situate upon the area originally appropriated, at the sum of Rs. 2,590 plus 15 per cent. on the market value payable under s. 42 of the Act, with interest on the whole amount decreed at the rate of 6 per cent. from the date of appropriation under the same section.

The claimant appealed to the High Court, on the ground (*inter alia*) that, with reference to s. 55 of Act X of 1870, he was entitled to require that the whole of the property in question should be taken, and compensation awarded to him in respect thereof.

The Hon. T. Conlan and Mr. G. T. Spankie for the appellant.

Munshi Ram Prasad for the respondent.

EDGE, C.J., and TYRRELL, J.—This was a case under the Land Acquisition Act (X of 1870) which was referred by the Collector to the Judge of Meerut. The Government took some of the out-offices and some of the land in the appellant's compound for public purposes. The appellant had objected under s. 55 of that Act that the Government must take the whole or none. As a matter of fact, the Government pulled down some of the out-offices, cut down some of the trees, and appropriated some of the land. The Judge of Meerut, assessing the compensation to be given to the appellant, came to the conclusion that the case did not fall within s. 55 of the Act. We are perfectly satisfied that the correct interpretation of s. 55 is the same as the interpretation that has been put on the corre-

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sponding s. 92 of the Land Clauses Consolidation Act; and that in this case, for instance, the appellant objecting, the Government could not take under the compulsory powers of the Act the out-offices or that portion of the compound which they did take, unless they took the whole, that is to say, the house with its other out-offices and appurtenances and its compound, so far as the compound was the compound of the house. Several English authorities on the point have been quoted, among them the following:—*Grosvenor v. The Hampstead Junction Railway Company* (1), *Cole v. The West London and Crystal Palace Railway Company* (2), and *King v. The Wycombe Railway Company* (3).

The Judge of Meerut was quite wrong in supposing that the English Courts in putting the interpretation which they did upon s. 92 of the Land Clauses Consolidation Act were dealing only with small or confined areas. The convenience of the proprietor is not the test. The proprietor is entitled to stand upon his rights and say, 'You shall not apply your compulsory powers at all, unless you take the whole of my house.' Under these circumstances we allow the appeal and remand the case to the Judge, directing him to assess the compensation on the whole property in question. In doing so he will ascertain, as far as possible, what the market value of the property was at the time it was taken, deducting of course Rs. 32, the value of the trees taken by the appellant, and he will, on that market value, add 15 per cent. for compulsory sale. We allow the appeal with costs, which will be allowed by the Judge in finally deciding and making his award.

*Appeal allowed.*

(1) 26 L. J., N. S. Ch. 731.

(2) 28 L. J., Ch. 767.

(3) 29 L. J., Ch. 462.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

GOPAL DAS (PETITIONER) v. ALAF KHAN AND ANOTHER

(OPPOSITE PARTY.)\*

1899  
March 23.

*Second appeal—Order on appeal affirming order granting application for review of judgment—High Court's power of revision—Civil Procedure Code, ss. 584, 622, 629.*

No second appeal lies to the High Court under s. 584 of the Civil Procedure Code from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment.

The High Court will not, in the exercise of its revisional powers under s. 622 of the Code, interfere with an order dismissing an appeal from an order under s. 629, inasmuch as there is a remedy by way of appeal from the final decree at the re-hearing.

This was an appeal under s. 10 of the Letters Patent, from an order of Straight, J., dismissing an application for revision under s. 622 of the Civil Procedure Code. The facts are stated in the judgment of Straight, J.

STRAIGHT, J.—The following are the facts out of which this application for revision has arisen. The respondents before me, Alaf Khan and Jungbaz Khan, brought a pre-emption suit in the court of the Subordinate Judge of Mainpuri against Sundar Lal, vendor, and Gopal Das, vendee, in respect of a sale by the former to the latter of a fifteen-biswansi zamindari share on the 16th September, 1885. A second suit by one Kharagjit, impeaching the same transaction, on the ground of pre-emptive right, was subsequently instituted in the same court, and Alaf Khan and Jungbaz Khan were made parties, defendants, to that suit, and Kharagjit defendant to their suit. Both suits were tried together, and, in the result, that of Kharagjit was decreed by the Subordinate Judge, on the ground that he was the superior pre-emptor and had the call of the two plaintiffs in the other suit, which was in turn dismissed and no appeal was preferred from either that decree or the decree in favour of Kharagjit, as plaintiff. By this last-mentioned decree, Kharagjit was directed to deposit in court the purchase-money

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\* Appeal under s. 10., Letters Patent.

1889 found to have been paid by Gopal Das to Sunder Lal within two months, otherwise his suit would stand dismissed. This Kharagjit failed to do, and thereupon Alaf Khan and Jungbaz Khan applied for review of judgment, setting up this failure on the part of Kharagjit, and the admitted fact of their being next to him in order of pre-emptive right as the grounds for the application. On the 20th May, 1887, the Subordinate Judge admitted the application for review, holding that it was covered by s. 623 of the Civil Procedure Code, the ascertainment by the petitioners of the failure of Kharagjit to deposit the money within time being the discovery of "a thing which was not known before."

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To this order of the Subordinate Judge, objection was taken by Gopal Das by way of appeal to the Judge in the manner indicated in s. 629 of the Code, and on the 5th September, 1887, the Judge upheld the order and dismissed the appeal with costs. It is this order of the Judge that is the subject of this application for revision before me under s. 622 of the Code. Now, I take it to be the recognised rule of this court that, if a party to civil proceedings applies to us to exercise our powers under s. 622, he must satisfy us that he has no other remedy open to him under the law to set right that which he says has been illegally or irregularly or without jurisdiction done by a Subordinate Court. Now, when the Subordinate Judge admitted the application of Altaf Khan and Jungbaz for review, the petitioner before us, Gopal Das, who was prejudiced thereby, had two alternatives open to him under s. 629 of the Code, namely, to object to such admission (a) by an appeal from the order granting the admission upon the grounds therein specified, or (b) in any appeal against the final decree or order made in the suit. Gopal Das availed himself of the first of these alternatives by taking an appeal to the Judge and staying further proceeding with the re-hearing pending its decision. The Judge has decided against him by dismissing his appeal, and the first question I have now to consider is, does any second appeal lie from the order of the Judge? I am very clearly of opinion that it does not. A right of appeal is the creation of a statute, and unless I can find any specific provision in the Code of Civil Procedure in

terms conferring such a right I cannot hold it to exist. Turning to that law I find in Part VI "of appeals" that there is an appeal from the decrees or from any part of the decrees of the Courts exercising original jurisdiction (s. 540), to a High Court from all decrees passed on appeal by any Court subordinate to a High Court (s. 584), from the orders specified in s. 588 and from no other such orders, in respect of which the orders passed in appeal "shall be final," and, in s. 629 to which I have already referred, from an order admitting an application for review of judgment. But as to this last matter there is no mention anywhere in terms to be found recognising a right of second appeal from an order passed on appeal from such an order. It is clear to my mind that an order passed on appeal from an order objecting to the admission of an application for review is not a "decree;" indeed, it is in terms contradistinguished in s. 629 from a decree. Consequently s. 584 which contains the only sanction to a second appeal, and that only from a "decree," cannot apply. So far, then, as the immediate proceeding under s. 629 which the petitioner has adopted is concerned, he has no power under the law to carry it further, except of course as provided in s. 622, if I consider that section to be applicable. But then arises the further question whether, as an appeal is provided by law from any decree that may hereafter be passed by the Subordinate Judge at the rehearing of the suit, that will, if his and the Judge's order of review remains untouched, take place, I should upon this application in anticipation determine the point as to whether it will be open to him to again contest the propriety of the order admitting the review. I am of opinion that I ought not to do so, and for the obvious reason that, assuming the case to be decided against the petitioner, not only will he have an appeal to the Judge from the decree, but a second appeal to this Court; which, if I refuse now to interfere under s. 622, on the ground that he has a remedy *in future*, will not have expressed any opinion upon the question of the propriety of grant of the review. If the case is decided in his favour, *cadit questio*. I therefore refuse to interfere under s. 622 of the Code and dismiss the petition, but costs will be costs in the cause.

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1889 The petitioner appealed from this decision under s. 10 of the  
 Letters Patent.  
 GOPAL DAS v. ALAF KHAN. EDGE, C. J., and TYBRELL, J.—We agree with the view taken  
 by Mr. Justice Straight, and we think that he exercised a sound discretion in refusing to interfere under s. 622 of the Civil Procedure Code.

We dismiss the appeal with costs.

*Appeal dismissed.*

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 April 9.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*  
 MUHAMMAD SAMI-UD-DIN KHAN (PLAINTIFF) v. MANNU LAL  
 AND OTHERS (DEFENDANTS).\*

*Mortgage, usufructuary—Suit for redemption—Conditional decree—Failure of mortgagor to pay in accordance with decree—Subsequent suit for redemption—Res judicata—Civil Procedure Code, s. 13—Foreclosure—Act IV of 1882 (Transfer of Property Act), s. 93—Estoppel—Act I of 1872 (Evidence Act), s. 115.*

In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff paying the defendants, within a time specified, a sum which was found still due to the latter, and the decree provided that if such sum was not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit accordingly stood dismissed. Subsequently he again sued for redemption, alleging that the mortgage-debt had now been satisfied from the usufruct.

*Held*, having regard to distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee, and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct.

Having regard to s. 93 of the Transfer of Property Act (IV of 1882), in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage-debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied, as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property.

\* Second Appeal No. 1183 of 1887 from a decree of M. S. Howell, Esq., District Judge of Aligarh, dated the 30th March, 1887, confirming a decree of Maulvi Saiyad Muhammad, Subordinate Judge of Aligarh, dated the 6th April, 1886.

The decision in *Sheik Golam Hossein v. Musammat Alla Rukhee Beebee* (1) treated as not binding since the passing of the Transfer of Property Act. *Chaita v. Purum Sookh* (2) and *Anrudh Singh v. Sheo Prasad* (3) referred to.

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Where the plaintiff in a suit for redemption of a usufructuary mortgage was the original mortgagor, who had by a registered instrument assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward, the original mortgagor as the person entitled to redeem,—held that as there was nothing in that litigation to show that the defendant-mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped by s. 115 of the Evidence Act (I of 1872) or by any principle of equitable estoppel from afterwards suing on his own account for redemption.

The facts of this case are stated in the judgment of Straight, J. *Mr. G. E. A. Ross and Mr. Hamidullah* for the appellant.

The Hon. Pandit *Ajudhia Nath* and Pandit *Ratan Chand* for the respondent.

STRAIGHT, J.—This second appeal raises questions of considerable difficulty, and in order to understand the method by which I have arrived at the conclusions I am about to pronounce, it is essential that I should state very fully the circumstances out of which this present litigation has arisen. In the year 1842, Dalip Singh and others mortgaged twenty biswas of mouza Karia Buzurg, in the Aligarh district, for a sum of Rs. 4,000 to one Khushwakt Rai. The mortgage was of a possessory kind, and the mortgagee was to take possession of the mortgaged twenty biswas and to satisfy the amount of the principal debt and the interest thereupon from the usufruct of the property. By various subsequent assignments, the interests of the original mortgagee passed to other persons, and in the end they centred in the person of Mannu Lal, the defendant-respondent to the present appeal. Among the persons interested under the mortgage of 1842 as mortgagors were Musammat Khushalo and others, and the extent of their interests therein was four biswas seven biswansis ten kaohwansis. On the 13th August 1881, Musammat Khushalo and others, under a registered instrument of that date, assigned over to the plaintiff in the present suit their interests in the four

(1) N.-W. H. C. Rep., 1871, p. 62.

(2) N.-W. H. C. Rep., 1867, p. 266.

(3) I. L. R., 4 All., 481.



1889      biswas seven biswansis ten kachwansis. From what I have said,  
 MUHAMMAD      it will thus be seen that the plaintiff-appellant before us repre-  
 SAMI-UD-DIN      sents the interests of certain mortgagors, while the defendant,  
 KHAN      Mannu Lal, and those who are arrayed alongside of him in the  
 v.      litigation represent the interests of the mortgagees.  
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The present suit is a suit for redemption, and it has been dismissed by both the Lower Courts, much upon the same ground, namely, that by the operation of a rule somewhat like that of *res judicata*, the plaintiff, having been a party to a suit which ended in a decree of this court of the 27th August, 1883, in which Musammât Khushalô and others were the plaintiffs and the present defendant was a defendant, is by that decree passed in that suit barred from now coming into court with his present claim. I have already stated that the mortgage of 1842 was of a usufructuary character, and that the term of it was that the mortgagees were to remain in possession so long as and until the principal money and the interest thereon were satisfied from the usufruct. In the suit which was brought by Musammât Khushalô and others in the year 1882, they claimed that not only had the mortgage been redeemed to the extent of their four biswas seven biswansis ten kachwansis share, but that, in addition, in proportion to the amount of that share, the mortgagees in possession had realized a considerable sum of money over and above what they were entitled to, and they claimed through the medium of the court to receive a decree for that amount.

It is unnecessary for me to deal with the decree of the Lower Court which dealt with that original suit as a court of first instance. It is enough to say that in appeal this court gave the plaintiffs a conditional decree subject to their paying into court the sum of Rs. 1,999-10-6 which had been found to be the amount still remaining due and owing from the plaintiffs to the defendant-mortgagee in possession, and the decree of this court went on to declare that if that amount was not paid within the time stated therein, the suit of the plaintiffs would stand dismissed. As a matter of fact that amount of money was not paid in, and

consequently that suit of Musammât Khushalo and others stood dismissed from the expiration of the fixed period.

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It is said, by the learned Judge in his judgment in this case that by the order of this Court passed in that suit, the right of redemption of Musammât Khushalo and others was extinguished, and that consequently with that extinguishment disappeared all or any rights that the present plaintiff possessed. It is suggested in the pleas taken in the present suit that that litigation was practically the litigation of the plaintiff, that he found the money for it, that he took a prominent part in promoting it, and that although in name he was not joined as a party, he was in fact a party thereto. I may say at once that from the way in which I look upon this matter, it is wholly indifferent to the decision of the case whether he was or was not a party to that suit. If I understand the law of mortgage as now more or less embodied in the Transfer of Property Act, by which we are governed in these provinces, there is nothing to prevent a person who has usufructually mortgaged his property from making a second usufructuary mortgage with a condition that the second mortgagee shall take all the necessary steps to effect and bring about the redemption of the first mortgage so as to obtain possession of the mortgaged property. I also understand the law to be that if a usufructuary mortgagor brings a suit against his usufructuary mortgagee, alleging that the mortgage has been satisfied out of the usufruct for his principal and interest, and in that suit it is found that, at the time of the determination of that suit, the mortgage has not been so satisfied, then there is no bar in law to his subsequently instituting a second suit after a further expiration of time when by further enjoyment of the profits of the property by the mortgagee the mortgagor can come into court and say the mortgage-debt has now been discharged. This is the distinction which places simple mortgagors and mortgagees and usufructuary mortgagors and mortgagees upon a distinct and different footing. It is unnecessary for me in the present case to do more than discuss the question in so far as it relates to usufructuary mortgages. It seems to me that even if it could be said that these usufructuary

1889      mortgagors wrongly brought their suit in the year 1882 and still  
 MUHAMMAD      more wrongly refused, or declined to, or refrained from paying into  
 SAMI-UD-DIN      Court the amount they were called upon to pay, there was nothing  
 KHAN      to prevent them at a subsequent period from bringing another suit  
 v.      in which they might allege and prove that the Rs. 1,999-10-6 had  
 MANNU LAL.      been satisfied out of the usufruct. From this it would be apparent  
                  that my view is that *quoad* the decree of this Court of the 27th  
                  August 1883, all that that decided was that in order to redeem and  
                  get possession of the property, the plaintiffs must pay the sum of  
                  Rs. 1,999-10-6 ; and if the present plaintiff can be held bound by  
                  that decree, this is all that can be held to have been decided against  
                  him. I may observe in passing that no question arises in this  
                  case as to the right of the plaintiff to maintain this suit for  
                  redemption as to the four biswas seven biswansis ten kachwansis  
                  shara, part of what was originally mortgaged. By that I mean  
                  it is not suggested that he was under the ordinary legal obligation  
                  regulating these matters of mortgage to come into court and  
                  offer to redeem the *whole* mortgage. It is admitted that so far this  
                  suit is maintainable.

Looking then at this as a suit brought by the plaintiff for redemption of mortgage as against the defendant-mortgagee in possession, is it barred by any rule of law such as *res judicata* or estoppel as enunciated in s. 115 of the Evidence Act, or by any other principle of equitable estoppel which we as a Court of equity ought to apply ? It seems to me that altogether apart from anything that may have taken place between the plaintiff and the assignors to him of an interest by way of subordinate charge, as to who should have instituted the suit which was originally brought, the plaintiff is, under the Transfer of Property Act, a person who at this time is interested in and has a charge upon the four biswas seven biswansis ten kachwansis. It would be protracting this judgment to unnecessary length were I to go in detail into the terms of the instrument of transfer of the 13th August 1881. It, in my opinion, constitutes a perfectly good document of title to sanction the plaintiff's maintaining his present suit.

For a moment to revert to the point as to whether the plaintiff is barred by the rule of *res judicata*. It is clear from the array of parties in the former litigation that he was no party to that litigation; but as I have already said, even if he were bound by what was done in that particular suit, all that the decision therein amounted to was a declaration of a Court that if the plaintiffs in that suit wanted to get possession of the property, then they must pay a sum of Rs. 1,999-10-6. Although, in the course of the hearing of this appeal this was not the ground on which the case was argued, and consequently no authorities bearing upon this point were referred to, I have been at pains to look into the matter. The reason why I said at the outset that it is not without difficulty is because of the circumstance that there is a Full Bench ruling of this Court, *Sheikh Golam Hossein v. Musammat Alla Rukhee Beebee* (1) in which it was held in effect that where a person by his own neglect has lost a remedy by process of execution to which he became entitled by an adjudication in a former suit, he cannot be premitted to revert to the position which he held prior to the institution of that suit and to bring a fresh suit. In that judgment, the first learned Chief Justice of this Court, Sir Walter Morgan, joined, and it was a ruling of the year 1871. I confess, upon referring to another ruling, *Chaita v. Purum Sookh* (2), I find it difficult to reconcile the view which in the first mentioned case he concurred in, with that expressed by him in the second case, in which it was held that where a person has obtained a decree for redemption but has not executed it within the prescribed period for execution, the mortgagee does not, by omission of the mortgagor to execute the decree, cease to be mortgagee, but the mortgagor or his representative may still maintain a fresh suit for redemption. I confess with the most profound respect that these two rulings appear to my mind irreconcilable. My brother Mahmood and I in the case of *Anrudh Singh v. Sheo Prasad* (3) followed the Full Bench ruling of 1871, but what I have now to say with regard to it is this; in

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(1) N.-W. P. H. C. Rep., 1871, p. 62. (2) N.-W. P. H. C. Rep. 1867, p. 256.

(3) I. L. R., 4 All., 481.

1889 the first place, when it was passed, the Transfer of Property Act, which embodies and defines the precise legal nature of the rights and obligations of mortgagors and mortgagees and as to the procedure to be adopted in suits between them, was not in force, and further, it does not appear to me, if I can form my opinion from the judgment of the Full Bench, that the question as to what was the precise nature of the rights of a usufructuary mortgagor and his usufructuary mortgagee was discussed. Taking the definition of the Transfer of Property Act as to what this latter's rights are, we find he is entitled to remain in possession and enjoyment of the property mortgaged according to the terms of the instrument, until such time as (in the case before me) the principal sum with interest thereupon shall have been satisfied and discharged from the usufruct. It is a noticeable matter in the Transfer of Property Act that in s. 93, which is to be found in the particular portion of the statute relating to redemption of mortgage, it is laid down in paragraph 2 that where a sum has been ordered by a Court to be paid in a suit for redemption of mortgage and is not paid, certain consequences will follow, or, to quote the words of that paragraph, it is enacted :—"If such payment is not so made, the defendant may (*unless the mortgage is simple or usufructuary*) apply to the Court for an order that the plaintiff and all persons claiming through or under him be debarred absolutely of all right to redeem." Therefore I presume from that indication in the statute itself that it was not contemplated that in a suit brought by a usufructuary mortgagor against a usufructuary mortgagee for possession upon the ground that he had been satisfied and discharged out of the usufruct, and having been ordered to pay something because the mortgagee had not been so satisfied, therefore the decree passed against him would have the effect of foreclosing him for all time from redeeming the property. It seems to me from what is stated in the Transfer of Property Act, as to the relations of a usufructuary mortgagor and mortgagee and their rights in reference to one another, that I am not constrained to follow that ruling of the Full Bench of this Court, and consequently I cannot hold that any doctrine or principle of *res judicata* applies to the present case.

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Then arises the question : Is there any principle such as s. 115 of the Evidence Act lays down, or any other equitable principle of estoppel that should bar the plaintiff from maintaining his present suit? I find nothing in the course of the proceedings in the former litigation of 1882 to lead one to the conclusion that the defendant was in any way induced to alter his position or to do any act in consequence of any conduct on the part of the plaintiff. I need scarcely say it is not enough that he should have put forward or consented to have put forward the original mortgagors as the persons entitled to redeem. It would no doubt have been far more satisfactory, under all circumstances, had he been joined as a party in that litigation, but by his action and his abstinence from asking to be joined therein, I cannot hold that there was any conduct on his part in respect of which it can be reasonably inferred that the defendants were led to do anything they would otherwise not have done. I am of opinion that there is no estoppel of any kind to bar the suit. This being the view that upon a very anxious and careful consideration of the whole matter I have arrived at, I have come to the conclusion that the appeal should be allowed and that the decree of the Lower Court should be set aside. That decree practically being passed upon a preliminary ground, this case must be dealt with under s. 562, Civil Procedure Code, and must be remanded to the Court of the Judge of Aligarh for restoration to the file of pending appeals and disposal upon the merits according to law. Costs to abide the result.

BRODHURST, J.—I concur.

*Cause remanded.*

## CRIMINAL REVISIONAL.

*Before Mr. Justice Brodhurst.*

QUEEN-EMPRESS *v.* KHALAK.

*Criminal Procedure Code, s. 35—"Distinct offences"—Act XLV of 1860 (Penal Code), ss. 75, 411—Practice.*

A person convicted under ss. 411—75 of the Penal Code is not convicted of "distinct offences" within the meaning of s. 35 of the Criminal Procedure Code. *Queen-Emress v. Zor Singh* (1) explained.

(1) I. L. R., 10 All., 146 ; Weekly Notes, 1888, p. 5.

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Where an offence under s. 411 read with s. 75 of the Penal Code appears to be deserving of a greater punishment than the Magistrate trying it can award, the best course for him to adopt is to commit the accused for trial to the Court of Session.

This was a reference under s. 438 of the Criminal Procedure Code by the Sessions Judge of Mainpuri. The facts of the case are stated in the judgment of Brodhurst, J.

BRODHURST, J.—The reference in this case is made under the following circumstances :—The Joint-Magistrate of Mainpuri tried Khalak Kisan under ss. 411, 75 of the Indian Penal Code. In his judgment he stated all the facts of the case and he concluded as follows :—“Defendant has given no satisfactory proof how he came to be in possession of them—the stolen articles—and it further appears that it is only about six months since he was released after two and a half years imprisonment on two charges under s. 411 of the Penal Code. I convict defendant under s. 411 of the Penal Code (retaining possession of stolen property knowing the same to be stolen). He is further charged with having been previously convicted on the 22nd December, 1885, on two charges under s. 411 of the Penal Code. He admits these convictions (the *misls* have been produced). Under ss. 411, 75 of the Penal Code (acting on the ruling in *Queen-Empress v. Zor Singh—Weekly Notes*, 1888, p. 5), I sentence defendant to be rigorously imprisoned for four years.”

The Sessions Judge in his referring order mentions that he called for the record under the provisions of s. 435 of the Criminal Procedure Code for the purpose of satisfying himself as to the legality of the sentence. He observes : “Under the provisions of s. 35 (b) of the Criminal Procedure Code, a Magistrate can, in the case of a person convicted at one trial of two or more *distinct offences*, impose an aggregate punishment not exceeding twice the amount of punishment he is ordinarily competent to inflict. In the present case I would submit that the prisoner was not convicted of two distinct offences; he was convicted of having been in dishonest possession of property stolen in a burglary committed in the prosecutor’s house, and he was further charged under s. 75 of the Indian Penal

with having been previously convicted of a similar offence. I am therefore of opinion that the fact that the prisoner was convicted under s. 411 of the Indian Penal Code after having been previously convicted of the same (*sic*) offence, was not sufficient to give the Joint Magistrate the increased powers referred to in s. 35 of the Criminal Procedure Code."

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I am responsible for the judgment in *Queen-Empress v. Zor Singh* (1). There is no doubt that just at the time I wrote that judgment, I was under the impression that a Magistrate of the first class might, under the provisions of s. 75 of the Penal Code on a second conviction as referred to in that section, award double the amount of punishment, as he may under the provisions of s. 35 (b) of the Criminal Procedure Code award an aggregate punishment not exceeding twice that which he is in the exercise of his ordinary jurisdiction competent to inflict. I think a Magistrate of that class might well be entrusted with such powers, but I soon became aware of the error referred to, and with my sanction the few words referred to by the Sessions Judge as *obiter dicta* were omitted from the judgment as reported in I. L. R., 10 All. 146. I think that, under the circumstances stated by the Joint Magistrate, Khalak Kisan was deserving of enhanced punishment, and that, following the remarks made by me in the case of *Queen-Empress v. Zor Sing* (1), the best course for the Joint Magistrate to have adopted would have been to have committed the accused for trial in the Court of Session under ss. 411, 75 of the Indian Penal Code. I direct that notice issue to Khalak Kisan to show cause why his conviction and sentence under ss. 411, 75 of the Penal Code should not be set aside, and why he should not be committed for trial, under the same sections, in the Court of Session (2).

(1) I. L. R., 10 All., 146; Weekly Notes, 1888, p. 5.

(2) The accused not having appeared in answer to the notice to show cause,

Brodhurst J., directed that he should be committed for trial under ss. 411, 75 of the Penal Code in the Court of Session.



P.C.  
J.C.  
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February 22.

## PRIVY COUNCIL.

ANAND KUAR AND ANOTHER, REPRESENTATIVES OF CHAUDHRI LACHMAN SINGH (DEFENDANT) v. TANSUKH (PLAINTIFF).

[On appeal from the High Court for the North-Western Provinces.]

*Question in issue—Parties—Admission.*

The plaintiff claimed to have inherited estate in the possession of the defendant, who was also related to the last owner, but who set up, independently of other title, a deed of gift from the latter in his favour. It was decided in the appellate Court that even if this deed had been executed, it was inoperative, and on this point the decision of the first Court was maintained. An issue having been fixed as to the execution, and the plaintiff also showing that the execution was disputed, their Lordships declined to treat the execution as not having been in contest.

APPEAL from a decree (26th May 1884) of the High Court affirming a decree (17th July 1882) of the Subordinate Judge of Meerut.

The question raised on this appeal was as to which of two collateral relations of the deceased was entitled to succeed to his heritage.

The question arose thus. Two brothers, one being Rup Singh, whose estate was now in dispute, and the other, Salig Ram, were grandsons of Guman Singh, whose only brother, Rattan Singh, was grandfather of Chaudhri Tansukh, the plaintiff, and of Madho Singh; the latter being nominally a defendant, as he waived any right in this suit. In fact, Salig Ram's son, Lachman Singh, was substantially the sole defendant in the suit which was brought by Chaudhri Tansukh against his two second cousins, Lachman Singh and Madho Singh, to prove his title to inherit to Rup Singh, deceased.

Rup Singh died in 1870; his widow died in 1872. The plaintiff alleged that Lachman Singh had taken possession, without real title, of Rup Singh's estate on his death, and previously, in 1875, had sued the plaintiff, Chaudhri Tansukh, for a declaration of his right, relying on an alleged deed of gift from Rup Singh, dated 1st

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March 1853, which suit failed, the decision having been that the gift was ineffectual. The rights of inheritance, resulting from the relationship of Lachman Singh as nephew's son, to the deceased, was negatived, according to the plaint, by his father, Salig Ram's having been adopted into another branch of the family, so as to lose his rights in the line of his natural parent. Madho Singh waived any right he might be held to have. But the substantial defence, that of Lachman Singh, was that the deed of 1st March 1853, executed by the deceased Kup Singh in his favour, was in operation.

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One of the issues in the present suit raised the question of the operation of this deed; the defendant insisting at the hearing that the decision referred to in the plaint was not that the deed had never been executed, but that it had never been accepted or acted upon.

The judgment of the Court in 1875 was that even if the deed had been executed, the gift was inoperative, never having been acted upon, or followed by possession, and Macnaghten's Hindu Law, p. 217, was referred to on this point. This judgment had been upheld by the High Court on 19th November 1880.

In the present suit the Subordinate Judge held that the right of inheritance from Rup Singh had not devolved upon Lachman Singh, because Salig Ram, the father of the latter, had been adopted into another family; and in regard to the deed of gift, the decision was that as Lachman Singh had never obtained possession under it of Rup Singh's estate, it could not now be enforced. With reference to the admission of Madho Singh, the Subordinate Judge decreed the plaintiff's claim to his share, as well as his own, decreeing the claim in full.

On an appeal by Lachman Singh, the High Court (OLDFIELD and MAHMOOD, JJ.) found the deed of gift not proved; and held that, even if executed, it never took effect to pass the property. The Court, however, modified the decree, holding that the plaintiff was entitled, upon what he had proved, to only a moiety of the estate claimed, inasmuch as Madho Singh's admission and disclaimer could

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not be used against the appellant, who had not set up the title of Madho Singh, to defeat the plaintiff, and had not had an opportunity of answering a title which had not been insisted on by the plaintiff. Reference was made to *Amirto Lal Bose v. Rajonsekant Mitter* (1).

Mr. C. W. Arathoon, for the appellant, argued that insufficient effect had been given to the fact that Rup Singh in his lifetime acted as Lachman Singh's guardian, treating him as his son, and living jointly with him—a state of things that rendered it unnecessary, in order to prove the fact of a gift having been made by Rup Singh to Lachman, that actual transfer of possession at any particular time should appear. The evidence of the execution of the deed of gift had not been negatived, but it had rather been the case that the question of its operation had been treated as decided. The question, therefore, of the actual execution had been left undisposed of, or at least was still a question open to decision, never having been in actual contest.

The respondent did not appear.

Their Lordships' Judgment was delivered by Lord MACNAGHTEN:—

Lord MACNAGHTEN :—Their Lordships are of opinion that there is no foundation for this appeal.

The appeal was based upon an allegation that the appellants, or the person from whom they claim to have derived title, had been in possession under a deed of gift made by Rup Singh. In order to make out their case it was incumbent on the appellants to prove the execution of the deed. Mr. Arathoon desired to proceed on the assumption that the matter had never been in contest. But that is not the case. The respondent referred to the deed in his plaint, and gave what seems to their Lordships to be distinct notice that its execution was not admitted. In the course of the suit the execution of the deed was put in issue in the ordinary way. Two Courts have tried the question, and both have held that the execution was not proved.

(1) L. R., 2 I. A., 113; 15 B. L. R., 10.

Under these circumstances their Lordships will humbly recommend to Her Majesty that the judgment appealed from should be affirmed and this appeal dismissed, but there will be no costs, as there is no appearance on the part of the respondent.

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*Appeal dismissed.*

Solicitors for the appellants: Messrs. T. L. Wilson & Co.

HAR LAL (DEFENDANT) v. SARDAR (PLAINTIFF).

[On appeal from the High Court, North-Western Provinces.]

*Assent to and validity of mutation of names in the collectorate record-of-rights—  
Act XIX of 1873 (N.-W. P. Land Revenue Act), ss. 94, 97.*

P. C.  
J. C.  
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March 27th:  
April 3rd.

The question was, according to the judgement of the High Court, whether a change of names in the collectorate record-of-rights represented a *bona fide* transfer by the plaintiff, or whether there was a mere assent by her to a paper transaction, relating to the ownership of a share in a village, in giving which assent she had not acted freely, but under undue influence. Reversing the decision of the High Court, which was that the plaintiff had assented to the proceedings under intimidation, their Lordships held that, on the evidence, no intimidation had been proved, and that a suit to cancel this “dakhil kharij” and for a declaration of the proprietary right of the plaintiff, in whose name the village stood before the mutation, had been rightly dismissed in the first Court.

APPEAL from a decree (15th January 1886) of the High Court, reversing a decree (25th September 1885) of the Subordinate Judge of Banda.

The suit out of which this appeal arose was for a declaration of title to a mauza named Nakra in the Banda district, and sought the cancellation of an order of 27th June 1881 for change of names in the record-of-rights, on the ground that the plaintiff's assent to such change had been obtained by intimidating her (1). The mauza Nakra was formerly owned in equal shares by Thakur

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(1) Act XIX of 1873, the N.-W. P. Land Revenue Act, in section 94, requires the Collector to keep and maintain the record of rights, registering “all changes that may take place;” and, in section 97, enacts that all successions to and transfers of proprietary rights shall be notified, and

if on inquiry they appear to have taken place, they shall be recorded in the register. Should a dispute arise, the entry is to be made subject to any order that may subsequently be passed by the civil court: section 101.

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Das and Musammat Sardar Dullia, widow of one Bojraj, deceased, and was recorded in their names. They were indebted to Bijai Ram, adoptive father of Har Lal, who was now appellant. Bijai Ram had, on the 4th August, 1865, obtained a money decree against them, and he proceeded to execute this decree by sale of their lands including Nakra. It was, however, disputed as to whether the latter mauza had not been excluded by the effect of an arbitration award from liability to be sold for their debts to Bijai.

According to the plaint, it was by purchases at successive judicial sales, first of Thakur Das's share and then of the Musammat's share that Ganesh Pershad, the recently deceased husband of the plaintiff, became entitled to the whole of Nakra, the sales being in execution of decrees in favour of Bijai Ram, who afterwards disputed, but without success, the right of Ganesh Pershad as purchaser, on the ground of collusion with the debtors. However, after the death of of Ganesh Pershad in April 1861 (he having been murdered on account of a quarrel not connected with the present dispute), his widow, the present plaintiff, assented to the name of Musammat Sardar Dullia being entered in the collectorate record of proprietors as owner of the eight-annas share of Nakra which the latter had possessed before the sale in execution of Bijai Ram's decree.

The plaint asked that "the mutation proceeding of 1881 be declared null and void, and that the plaintiff's right of proprietary possession as widow of Ganesh Pershad be declared." It alleged a gift of her assumed share in Nakra by Musammat Sardar Dullia to the defendant, Har Lal, in July 1872, and the latter at first was sued alone. But Har Lal in his defence maintained that the suit could not proceed against him alone, without Musammat Sardar Dullia being impleaded.

The Subordinate Judge, Manmohan Lal, Rai Bahadur, made the order on 17th December 1884, that she should be made a defendant under s. 32 of the Code of Civil Procedure. She referred to herself in the following written statement filed by her as defendant No. 2:—

"During the lifetime of the plaintiff's husband there was unity of interest between him and defendant No. 2, with their mutual

consent. On the death of the plaintiff's husband, an application was filed by defendant No. 2 for entry of her name in respect of the entire mauza Nakra, on the declaration of her being the actual proprietor thereof; then the plaintiff, of her own accord and free will, and without any compulsion or coercion, filed an application before a competent authority for the entry of defendant's name in respect of an 8-anna share in mauza Nakra, and the defendant, No. 2, waived her right to the other 8-anna share. Therefore the plaintiff cannot now deviate from her former declaration according to s. 115 of the Evidence Act."

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The Subordinate Judge found it clearly proved that all the proceedings relating to the mutation of names were taken by the plaintiff willingly, and that the entry of names was duly made. He found that the plaintiff's late husband, Ganesh Pershad, was in his lifetime in the employment of Mussammat Sardar Dullia as a mukhtiar, and that not until she had executed a deed-of-gift in favour of Har Lal, for the entire mauza of Nakra (including the 8-anna share claimed by the plaintiff) had been entered in the name of Har Lal, did the plaintiff raise any objection. Not till then did she file her objection to the entry of Har Lal's name, which she ultimately did, and carried the question through the offices up to the Commissioner and to the Board of Revenue. The Subordinate Judge also found that the plaintiff had been lambardar, while Musammat Sardar Dullia had only been pattidar of her share, so that collections of rent by the former proved nothing in her favour as between the two. He declined to pronounce whether the possession of Ganesh Pershad had been proprietary on his own account or only *benami* for his employer, Musammat Sardar Dullia, because "when she" (the latter) "had become owner of the share in Nakra by the admission of the plaintiff, she had power to make the gift in favour of Har Lal, and that the plaintiff had no concern therewith."

He therefore dismissed the plaintiff's claim.

On an appeal to the High Court by the plaintiff, a Division Bench (PETHBRAM, C.J., and TYRELL, J.), reversed the above

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decision and decreed the plaintiff's claim. Their judgment was as follows:—

“It is unquestionable that up to May 1881, the legal estate in the whole village vested in the representative of the deceased Ganesh Pershad, and whatever other statements may have been imported into the case, it is clear,—and this was accepted by the Court below—that the defendant's title is based exclusively on the transaction between her and the plaintiff in the Revenue Court and the dakhil-kharij proceedings. So that the real question is whether this was a *bond fide* transfer by the plaintiff, or whether there was a mere assent by her to a paper transaction relating to the ownership of the 8-anna share, and she did not act freely, but under coercion. We have heard all the evidence in the case, and we entertain no doubt, not only that, under the circumstances which have been proved, the plaintiff's allegations were extremely probable, but that the direct evidence produced by her was sufficient to establish her allegations. On the other hand, it appears to us to be almost impossible that the defendant's story should be true, and the alleged reason why the defendant should, according to her story leave any part of her estate in the plaintiff's hands, is incredible to us. We cannot believe that the defendant would give half her property to the plaintiff from motives of commiseration for the murder of the latter's husband; and it seems probable that the plaintiff's apparent acquiescence in the defendant's wishes regarding half the village is rightly explained by the intimidation which she has alleged. It therefore appears that the Lower Court should have decided in favour of the appellant, and the decree must, therefore, be reversed and the appeal allowed with costs of both Courts.”

On this appeal,

Mr. R. V. Doyne, for the appellant, argued that the earlier relations of the parties, not sufficiently adverted to by the High Court, explained the conduct of the respondent in assenting to the proceedings at which the change of names had been effected, a change which she had since sought to have disallowed. The contention and actual state of the facts was that Mussammat Sardar

Dullia had been the real purchaser, although she had used the name of her agent Ganesh Pershad *benami* for her. To show this, he referred to an application of 12th May, 1881, to the Deputy Collector, in which she alleged that by reason of her being *parda-nashin*, she had the name Ganesh Pershad, her “karinda,” fictitiously entered against mauza Nakra in the column of proprietors: also that Ganesh Pershad having lost his life, her own name should be entered. Reference was also made to a petition of the 18th of the same month presented by Musammat Sardar, the respondent, stating the death of her husband “shareholder and lambardar of Nakra,” and requesting that her own name and that of Musammat Sardar Dullia should be entered in respect of equal shares. Also to a statement of the respondent that her claim was only to the half of Nakra purchased by her husband at the auction sale, (*i.e.*, Thakur Das’s moiety), and that Musammat Dullia was entitled to the other half, *i.e.*, that which had been the subject of sale apparently to Ganesh Pershad. Moreover, as held by the first Court, the burden of proof was on the respondent to prove intimidation and coercion exercised upon her, and in this she had failed.

The respondent did not appear. Their Lordship’s judgment was delivered by LORD HOBHOUSE.

LORD HOBHOUSE.—The only question in this case is as to the validity of certain transactions which took place in the months of May and June 1881 affecting the title to a moiety of a village called Nakra. The parties to the transaction were, first, the plaintiff, who is the widow of one Ganesh Pershad, and, secondly, the defendant, Sardar Dullia, under whom the other defendant, Har Lal, claims by virtue of a deed-of-gift.

The nature of the transactions is this: The village Nakra stood in the name of Ganesh Pershad, husband of the plaintiff, who had been the servant and agent of Dullia’s husband, and afterwards of herself, and who had when in their service acquired the ownership of the village. He was recorded in the Collector’s books as the owner. In May and June 1881 the plaintiff came before the patwari, acknowledged Dullia’s title to one moiety of the village,

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claiming the other moiety for herself, and a mutation of names was effected from that of Ganesh Pershad into those of the plaintiff herself and of Dullia, one moiety each. The mutation of names was followed by possession on the part of Dullia by receipt of rents and profits, and she was found to be in possession in a proceeding before the Revenue Court in November 1883, when she executed the gift to Har Lal, and he applied for possession. The plaintiff now says that in effecting this mutation of names she was acting under intimidation and fear; that Dullia had incited a caste or sect in the village called Lodhis, hostile to Ganesh Pershad, who threatened the plaintiff with death unless she would transfer half the estate to Dullia. If the plaintiff fails to prove that case, her suit must fail altogether.

Now, Ganesh Pershad was murdered on the 13th of April 1881, and his murder was imputed to this caste of Lodhis, five of whom were committed for trial. But it turned out that though the real culprit was a Lodhi, he was a person who had a private grievance against Ganesh Pershad, who, he said, had deprived him of his estate. He killed him out of private revenge. He was convicted and sentenced to death, and the other four who were tried with him were acquitted. The suggestion made in the suit now is still that the real murderers were the caste of Lodhis, and that they effected the murder because they were at enmity with Ganesh Pershad and favoured Dullia, and that the same motives operated to make them threaten the plaintiff unless she would transfer a moiety of the estate to Dullia. To prove that case several witnesses were called. The Subordinate Judge disbelieved the witnesses. He considered that their character was such as to make them not very trustworthy; that there were discrepancies in their evidence; and, above all, that the improbability of their story was so great that it should be rejected. On those grounds he dismissed the suit.

The plaintiff appealed to the High Court, and the High Court say as to the evidence:—"We have heard all the evidence in the case, and we entertain no doubt, not only that under the circumstances which have been proved the plaintiff's allegations were extremely

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probable, but that the direct evidence produced by her was sufficient to establish her allegations." That is the whole of their comment on the evidence. They do not mention any point on which they think the Subordinate Judge has gone wrong in disbelieving the witnesses, but they differed with him in the result, and they reversed his decree, and gave the plaintiff a decree for the moiety of the estate that she claimed.

Such being the difference between the Courts below, the duty is thrown upon their Lordships of looking into the whole of the evidence, and of examining which of them is right.

The substantial story told by the witnesses is this: that one day after the murder of Ganesh Pershad—nobody says exactly how long, but one of them says a month after—the plaintiff and Dullia were sitting at the doors of their respective houses, which closely adjoined one another; that on that occasion Dullia spoke to a number of Lodhis who were present, and incited them to threaten the plaintiff with death or injury if she did not give Dullia half the estate; that the plaintiff at first refused; that she refused several times, but the mob of Lodhis went on repeating the threats, until at last the plaintiff yielded and promised to give the moiety of the estate. Therefore what the Court is asked to believe is that, while five of these Lodhis were accused of a capital crime and were on their trial, another group of Lodhis assembled to commit another heinous offence by intimidating the widow of their former victim into parting with some of her property, from the very same motive that instigated the murder of Ganesh Pershad, and that the person who was to profit by that crime sat by and openly incited it. That is a story which would require proof by clear consistent testimony from persons who are above suspicion. Six witnesses are called to prove it. Three of them are tenants of the plaintiff, one of them is a servant of the plaintiff, and one of them is the plaintiff's brother, and the sixth is apparently an independent man.

What has been the conduct of the parties? The plaintiff herself does not go to any Magistrate, and does not seek any assistance. Shortly afterwards—we cannot tell exactly how long, but probably

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a fortnight or three weeks afterwards—she appears openly before the patwari, is examined by him in the presence of her own general mukhtiar, one Debi Pershad, and gives evidence that Dullia is the proper owner of one moiety of the estate, and that the two have agreed to share that which stood in the name of Ganesh Pershad. The witnesses—these tenants, servants, brother, and neighbour—all appear to have been perfectly supine. Having seen this heinous crime committed, knowing that their mistress or their friend was under threats against her life, they do not appear to have gone to anybody to seek any assistance at all.

Their Lordships cannot agree with the High Court that that is a probable story. On the contrary, it seems to them to be a story of the highest improbability and one not to be believed without the clearest and most cogent evidence.

Then as to the amount of contradiction. The only independent witness is also the only one who speaks in any detail to the transactions, and he contradicts himself in a very material point. In the course of his examination he is asked whether he knew Dullia, whom he says he saw inciting the mob to threaten the plaintiff. He answered thus; “I did not hear”—by which he means I never heard—“the voice of Musammat Sardar Dullia, except on that day. I have seen Sardar Dullia on several occasions and recognise her also. On the day she asked the Lodhis to threaten the plaintiff her face was visible by the side of the door. I recognised her.” But then in a subsequent part of his examination he says: “When the said Musammat”—that is Dullia—“was seated in her dehliz and asked to have the plaintiff threatened, I took her for the said Musammat because the people said it was her.” “I did not see her face, nor could I recognise her.” So that on the important point of the identity of Dullia this witness tells first one story and then the exact contradictory of it. Moreover, the witnesses mention several persons as having been present on the occasion. Three of those persons are called. Two of them deny that there was any enmity between the Lodhis and Ganesh Pershad, and all three deny that there was any intimidation whatever. There

seems to have been a conference of some kind, and according to these three witnesses Dullia required the plaintiff, whether on legal or moral grounds does not appear, to give her some advantage out of the estate, and the agreement ultimately was that she should have half.

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So much for the evidence that was given. But then there was evidence which might have been given, and was not given, of a very important kind. The plaintiff herself, who would be a very important witness, is not one of those Indian ladies who could not be expected to come forward in a Court of justice. She is in the habit of appearing in public with her face uncovered, and she did appear before the patwari and was examined in the mutation case. Therefore there is no reason why she should not have appeared in this case, and yet she is not called. Moreover, the witnesses said that her general mukhtar, Debi Pershad, was present on the occasion of the threats. He appeared also on the question about possession after conveyance to Har Lal, and he deposed to the appearance of the plaintiff before the patwari and to the story that was told there, and he said nothing then about any threat used to the plaintiff. He did say that after the mutation into Dullia's name he received the rents, and that he paid over a moiety to Dullia, because he was afraid of the villagers; but it appeared that he very soon abstained from paying the moiety, and, when asked whether he was not still afraid of the villagers, he said he was, but he had not an opportunity to pay the rents. So that he gave somewhat ambiguous evidence on that occasion. But it is obvious that he would be the most important witness to prove the plaintiff's story, if it were true, and yet he is not called, although he is still living.

Having regard then to the strange nature of the plaintiff's story; to the position of her witnesses; to her conduct and theirs at the time of the alleged threat; to the contradictions, internal and external, of the evidence adduced; and to the omission of evidence that ought to have been adduced, their Lordships think that her story is entirely incredible; that the Subordinate Judge was quite right in rejecting it; that the High Court ought to have

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dismissed the appeal to them with costs; that a decree to that effect should now be made; and that the respondent should pay the costs of this appeal. Their Lordships will humbly advise Her Majesty to that effect.

*Appeal allowed.*

Solicitors for the appellant: Messrs. *Pyke and Parrott.*

## APPELLATE CIVIL.

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*April 2.*

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.*

**CHAJMAL DAS AND OTHERS (DEFENDANTS) v. JAGDAMBA PRASAD (PLAINTIFF).\***

*Appeal—Abatement—Death of plaintiff-respondent—Application by defendants-appellants for substitution—Application presented after the 1st July 1888—Limitation—Civil Procedure Code, ss. 368, 582—Civil Procedure Code Amendment Act (VII of 1888), ss. 53, 66—Act XV of 1877 (Limitation Act), sch. ii, No. 175C.*

The plaintiff-respondent in an appeal pending before the High Court died on the 17th September 1885. Subsequently *D* applied to the High Court to be brought on the record as legal representative of the deceased; on the 15th April 1886, he was referred to a regular suit to establish his title as such representative, and on the 25th February 1887, such suit was dismissed. On the 8th February 1886, the defendants-appellants applied to the High Court for judgment; but the application was dismissed under the decision of the Full Bench in *Chajmal Das v. Jagdamba Prasad* (1). On 24th July 1888, they applied to the High Court to bring certain persons upon the record as the legal representatives of the deceased plaintiff-respondent,

*Held* that the application having been made subsequent to the 1st July, 1888, when the Civil Procedure Code Amendment Act (VII of 1888) came into force, and being an entirely fresh application not in continuation of and former proceedings between the same parties, must be dealt with under that Act and not under the Civil Procedure Code as it stood before the amendment; and that as it was made more than six months after the death of deceased plaintiff-respondent, the appeal abated, with reference to s. 368 of the Code and Art. 175C of the Limitation Act (XV of 1877).

*Held* also that the petitioner had not shown "sufficient cause" within the meaning of s. 368 of the Code for not making the application within the prescribed period. *Ram Jiwan Mal v. Chand Mal* (2) referred to.

\* Application in First Appeal, No 59 of 1884, from a decree of Maulvi Muhammad Abdul Basit Khan, Subordinate Judge of Mainpuri, dated the 31st March, 1884.

(1) I. L. R., 10 All., 260.

(2) I. L. R., 10 All., 587.

THIS was a reference to a Bench of three Judges by Straight and Mahmood, JJ. The facts are stated in the following order of reference.

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STRAIGHT, J.—In order to make the preliminary questions that arise in the appeal by way of preliminary intelligible, the following facts may conveniently be stated :—

On the 20th July 1883, one Jagdamba Prasad instituted a suit against his father, Narain Lal, and the present defendants-appellants and other persons, to avoid certain alienations which he alleged Narain Lal had made in favour of the other defendants in derogation of the plaintiff's rights as a member of a joint Hindu family consisting of himself and his father. He also sought partition of his share in the joint estate from that of his father's share. Narain Lal made no defence to the suit, but it was contested by the defendants, who are appellants upon the record in this Court. The Sub-Judge of Mainpuri decreed the plaintiff's claim, and upon the 15th April 1884, the three defendants who had contested the suit filed an appeal in this Court. Upon the 17th September 1885, Jagdamba Prasad died, leaving behind him his father, his mother, his widow and a daughter. The widow and the daughter are now out of the question because they are already dead. Subsequently one Durga Prasad, alleging himself to be the adopted son of Jagdamba Prasad, applied to this Court to be brought on the record of the appeal here in the character of his legal representative. The Court considered that it was desirable before doing so that Durga Prasad should establish, if he could, his title as the adopted son of Jagdamba Prasad, and he was accordingly relegated to a suit for this purpose, which suit was instituted, tried and determined against him. He therefore is now also out of the question. Subsequently the defendants-appellants in this Court put in a petition alleging that by reason of the circumstance that the legal representatives of Jagdamba Prasad had not put in any petition to be brought upon the record to defend the appeal, the defendants-appellants were entitled to judgment; and the question that they raised by the petition went to the Full Bench, and the Full Bench decided in *Chajmal Das v. Jagdamba*

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*Prasad* (1) that art. 178 of the Limitation Law was applicable to the case. The next matter to be mentioned is that upon the 24th July 1888, the defendants-appellants put in a petition praying that Narain Lal and Musammat Genda Kuar should be brought upon the record as the legal representatives of Jagdamba Prasad, so that by their being made parties to the appeal, this Court might proceed to dispose of the question raised by the former petition, which was put in by the petitioners on the 8th February 1886. It is this petition that has come before us to-day, and it has been supported by Mr. *Jwala Prasad* and Mr. *Conlan*, on behalf of the defendants-appellants. It has been opposed by Mr. *Jotindronath Chaudhri* and Mr. *Kashi Prasad*, who severally represent Narain Lal and Musammat Genda Kuar. The position taken up by these learned gentlemen is that they are agreed in the contention that Musammat Genda Kuar is the proper person to bring upon the record, and if no difficulty had arisen upon another question we could have proceeded to dispose of the matter in difference as between Narain Lal and Musammat Genda Kuar as to which of them should be brought upon the record. But the point has been raised as to whether the petition at the instance of the defendants-appellants, which was filed on the 24th July, 1888, is to be dealt with under the provisions by way of amendment which have been introduced into the Civil Procedure Code by Act VII of 1888, or whether it is to be dealt with under the provisions of the Civil Procedure Code as it stood till the date when the amending Act came into operation: in other words, whether we are to apply a six months' limitation to the petition of the 24th July 1888, under the the new law, or, as the Full Bench ruling decided in this very case, the three years' rule of limitation. It is to my mind difficult to see how, looking to the fact that the petition was presented after Act VII of 1888 came into operation, and no saving clause is caused therein to protect applications in reference to rights and incidents that have accrued in connection with litigations pending prior thereto, we can do other than apply the six months' rule. We have, looking to the terms of sec-

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(1) I. L. R., 10 All., 260.

tion 582, as read with section 368 of the Civil Procedure Code, to take the defendants-appellants as standing in the position of plaintiffs in the suits, and as such standing as plaintiffs in the suit, asking us to bring upon the record the legal representatives of a deceased defendant. According to the law now passed they were bound to do this within six months from the 17th September, 1885, the date of the death of Jagdamba Prasad. Mr. *Conlan*, on behalf of the defendants-appellants, points out the hardship that such a construction of the statute would put upon his clients; but as at present advised I find it difficult to see how it is possible to adopt any other view. The case is necessarily one of considerable importance, because whatever view we arrive at as to the proper construction to be placed upon Act VII of 1888 read with the old Civil Procedure Code, that construction must govern a very large number of applications that will be presented which are pending in this Court in reference to the Full Bench ruling in this very case which is now before us. Under these circumstances I think that it is desirable that my brother Mahmood and I should have the advantage of the learned Chief Justice's assistance in disposing of this particular point, and, accordingly as the question is determined, what the effect of the action or want of action on the part of the defendants-appellants will be upon this appeal in reference to its abatement under s. 368 read with s. 582 of the Civil Procedure Code.

MAHMOOD, J.—I willingly agree to the order of reference which has been made.

The reference was ordered to be laid before a Bench consisting of Edge, C.J., and Straight and Mahmood, J.J.

The Hon. T. *Conlan* and Lala *Juala Prasad*, for the petitioners. Babu *Jogindro Nath Chaudhri* and Munshi *Kashi Prasad*, for Narain Lal and Genda Kuar.

STRAIGHT, J.—This is an application made by the appellant in the F. A. No. 59 of 1884, pending in this Court, praying that Narain Lal and Musammat Genda Kuar should be brought upon the record as the legal representatives of Jagdamba Prasad, the

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deceased plaintiff-respondent, whose death took place upon the 17th September 1885. The history of the litigation to which the appeal pending in this Court has reference, and in respect of which this application now before us has been made, is very fully stated in my referring order to the 26th November, 1888, in which my brother Mahmood concurred. There are before this Full Bench only two questions for determination. The first of those questions is whether the application of these petitioners, who are appellants in the appeal in this Court, is to be dealt with under the Civil Procedure Code, Act XIV of 1882, as amended by Act VII of 1888, or whether it is to be dealt with under Act XIV of 1882, as it stood before it was so amended. The second question is, assuming that it is to be dealt with under Act XIV of 1882, as amended by Act VII of 1888, have the petitioners satisfied us that they had sufficient cause for not making their application within the period required by law and as contemplated by s. 368 of the Civil Procedure Code of 1882 as amended by Act VII of 1888 ?

I have very carefully considered this question, and it may be seen from the terms in which the order of reference was made that from the moment of this first point being raised, I did not entertain much doubt as to what the decision should be. Further consideration has not altered my view, and I have come to the conclusion that this application of the 24th July 1888, which was presented to this Court subsequent to the coming into operation of Act VII of 1888 amending Act XIV of 1882, must be entertained, dealt with and disposed of under those two statutes taken together. In the Full Bench ruling of this Court, which determined the mode in which questions arising between mortgagors and mortgagees in respect of mortgages made before the passing and coming into operation of the Transfer of Property Act (1), I stated that I believed the rule of law to be that no person has any vested right in procedure, and that an application made or a suit commenced after a particular Act regulating procedure has come into operation must be dealt with according to the rules provided in such Act. It is true that

(1) *Shib Lal v. Ganga Prasad*, I. L. R., 6 All., 262.

the litigation between these petitioners and Jagdamba Prasad commenced as far back as 1884, and that the appeal was filed in this Court upon the 15th April 1884. But it is equally clear that the application which we are now concerned with was a fresh application and not a continuation of any former proceedings taken by the same parties: in short it was an entirely new application made on the 24th July 1888, which date I need scarcely point out was subsequent to the 1st of July 1888, when Act VII of 1888 with its amendment of Act XIV of 1882 had come into operation. The point of time then to be looked at for the purpose of determining the question of limitation, which has now been settled by Act VII of 1888 in its amendment of the then existing Civil Procedure Code and of the then existing Limitation Act, is the 17th September 1885, the date of the death of Jagdamba Prasad. It is therefore clear that the application being made after the amendment of Act XIV of 1882 had been made by Act VII of 1888, s. 368, Civil Procedure Code, as it now stands with the interpretation to be attached to the article of the Limitation Law which is now numbered Art. 175C, to be found in the schedule of Act VII of 1888, is to be applied to the present case. As I stated in the referring order, these defendants-appellants are to be regarded in the light of plaintiffs in the suit, and they stand in the position of plaintiffs who are coming in to have the representatives of a deceased defendant brought upon the record. Now from the terms of that article which amends the Limitation Law, the starting point is the date of the death of the deceased defendant or of the deceased plaintiff-respondent. In this case Jagdamba Prasad was the deceased plaintiff-respondent, and the date of his death is the date from which time must be counted. As that death took place on the 17th September 1885, and as the application to bring upon the record the heirs of the deceased was not made until the 24th July 1888, when the amending Act VII had come into force, it has not been made within the time, and cannot therefore *prima facie* be granted.

The second question then that arises is, have the petitioners satisfied the Court that they had "sufficient cause" for not making

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the application within the required period? I have taken occasion more than once to say that the Limitation Law in force in this country is made for the purpose of being obeyed, and not, as the suitors seem to imagine, of being disobeyed, and indulgence under it is not to be extended in uncertain haphazard fashion according to the fancy of a particular Judge or Bench of Judges, but upon well understood and recognised rules even at the risk of hardship to a particular party. For my own part, I do not think that in the present case any hardship will be inflicted upon these petitioners; they have no one but themselves to blame for the consequences that have resulted from their own negligence and dilatoriness. Recently the learned Chief Justice and my brother Tyrrell have laid down in very explicit terms the correct rule in regard to the mode in which the provisions of s. 14 of the Limitation Act are to be applied. By parity of reasoning the principle may be used in dealing with the question of what is "sufficient cause" under s. 368, Civil Procedure Code, with which I am now concerned. In the case above referred to, the learned Chief Justice and my brother Tyrrell accepted the ruling of my brother Mahmood in *Ram Jiwan Mal v. Chand Mal*(1), in which the learned Judge's remarks were as follows. He says:—"In my opinion s. 14 of the Limitation Act itself does not contemplate cases where questions of want of jurisdiction arise from simple ignorance of the law, the facts being fully apparent and clear, and is limited to cases where from *bond fide* mistakes of fact the suitor has been misled into litigating in a wrong Court. The phrase 'other cause of a like nature' which occurs in the section is rather vague, but it cannot be held to undo the effect of the constitutional obligation which the law imposes upon every citizen to know the law of the land in which he lives." Now applying that principle to the case before us, I cannot for a moment come to the conclusion that these petitioners have shown any "sufficient cause" for not making their application within the period provided by law. Great stress is laid by them upon the circumstance that by the action of this Court in consequence of

(1) I.L.R., 10 All., 587.

the application made by Durga Prasad to be brought on the record in place of Jagdamba Prasad, the proceedings in their appeal were hung up for a considerable time. They were no doubt hung up from the 15th April 1886, until 25th February 1887, when the suit of Durga Prasad was dismissed by the Sub-Judge of Mainpuri; but even if indulgence for that period were to be granted to them, yet they had from the 25th February 1887 until the 24th July 1888, or a period of more than a year, left within which to apply, and yet no application was made on the part of these petitioners of the character and description they have now presented. I am of opinion that both the questions referred must be answered adversely to the petitioners. The first is answered by saying that this application is governed by the existing Civil Procedure Code with the amendment introduced by Act VII of 1888, the second that they have not satisfied us that they had "sufficient cause" for not preferring the application contained in their present petition within the proper period.

The effect of that view will be that the appeal will abate; but as this Bench is not seized of the appeal, the view expressed by this Bench will be laid before the Division Bench, and no doubt will be given effect to by that Bench.

EDGE, C.J.—I concur.

MAHMOOD, J.—I also concur and concur entirely in what has fallen from my brother Straight. Yet I wish to add a few words to what he has said. The real difficulty in this case, as it seems to me, has arisen over the Full Bench ruling of this court, where a line of distinction was drawn between plaintiffs-appellants and defendants-appellants, for the purpose of array of parties, after the death of any respondent whether such respondent be plaintiff or the defendant. I have no desire to refer to those rulings, because their effect has now been settled by Act VII of 1888, to which my brother Straight has already referred.

The other difficulty has arisen in consequence of the circumstance that in s. 368 of the Code of Civil Procedure the following words

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occur:—"When the plaintiff fails to make such application within the period prescribed therefor, the suit shall abate, unless he satisfies the Court that he had sufficient cause for not making the application within such period."

This is not the first occasion upon which I have expressed a regret that this question as to the extension of the period of limitation or as to the interpretation of what the "*sufficient cause*" should be, is out of place in the Code of Civil Procedure, because that is not an enactment dealing with that department of the abjective law of Limitation. The proper place for the sentence above quoted would have been s. 5 of Act XV of 1877. It is, however, not there, and because it is not there, we have had the difficulty with which my brother Straight has fully dealt, and which required the case to be dealt with by three Judges instead of my brother Straight and myself, when we originally heard the case in the Division Bench.

The judgment of my brother, however, disposes of the difficulty, and I agree with him entirely.

## APPELLATE CIVIL.

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*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*

BHAGWANT SINGH (PLAINTIFF) v. DARYAO SINGH AND  
OTHERS (DEFENDANTS).\*

*Bond—Interest post diem—Damages for non-payment on due date—Limitation—Act XV of 1877 (Limitation Act), sch. ii, No. 116—Charge on hypothecated property—Successive or continuing breaches of contract—Practice—Danger of deciding case upon a document by construction put on another document in another suit.*

A contract to pay interest *post diem* on a mortgage ought not to be implied when the parties to the written contract have not expressed therein any such intention. This is particularly the case where the written contract does in clear terms provide for the payment of interest and compound interest during the term of the mortgage. *Narain Lal v. Chajmal Das* (1) followed. *Chhab Nath v. Kamta Prasad* (2) and *Baldeo Panday v. Gopal Rai* (3) referred to.

\* First Appeal, No. 74 of 1888, from a decree of Maulvi Shah Ahmad-ul-lah, Subordinate Judge of Mainpuri, dated the 14th February, 1888.

(1) Decided 7th March, 1889, not yet reported.

(2) I. L. R., 7 All., 383.

(3) I. L. R., 1 All., 603.

Damages given after the due date of a mortgage for non-payment of the principal money upon the due date, are damages for breach of contract, and not interest payable in performance of a contract; and under art. 116, sch. ii, of the Limitation Act (XV of 1877), a suit to recover such damages must be brought within six years from the time when the contract for the breach of which they are claimed was broken. It cannot be said that such damages are, from the date when the contract was broken, and even before they have been ascertained or decreed, a charge upon the property hypothecated, so as to make art. 116 inapplicable. *Price v. The Great Western Railway Co.* (1), *Norgan v. Jones* (2), *Gordillo v. Weguslin* (3), *in re Kerr's Policy* (4), *Lippard v. Ricketts* (5), *Cook v. Fowler* (6) and *Bishen Dyal v. Udit Narain* (7) distinguished.

In such cases there is one breach of the contract, namely, the non-payment on the date agreed upon; and there is no question of continuing or successive breaches. *Mansab Ali v. Gulab Chand* (8) referred to.

The danger pointed out of deciding one case relating to a bond by the construction placed in another suit on another and a different bond.

THE facts of this case are sufficiently stated in the judgment of the Court.

The Hon. Pandit *Ajudhia Nath* and Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Ram Prasad* and Babu *Durga Charan Banerji*, for the respondents.

EDGE, C.J., and TYRRELL, J.—This was a suit on a hypothecation bond dated September 24th, 1875. The bond was in the following terms:—"I, Hansraj Singh, son of Bhajan Singh, caste Thakur, occupation zamindári, resident and zamindár of Kalhor Bajhana, pargana Karor, tahsil Mainpuri, do declare as follows:—I have borrowed Rs. 1,000, half of which is Rs. 500, from Bhagwant Singh, son of Dalel Singh, caste Thakur, occupation zamindari and banking, of Faizpur, pargana Karor, to pay the debt due to Baldeo Singh, Thakur, resident of mauza Bendauli, pargana Mainpuri, and brought the same to my use. I promise to pay the whole amount, including principal and interest, in six years. The interest has been agreed to be paid at Re. 1-2 per cent. per mensem. I shall pay

(1) 16 L. J. Exch., 87.

(2) 22 L. J. Exch., 232.

(3) L. R., 5 Ch. D., 387.

(4) L. R., 8 Eq., 331.

(5) L. R., 14 Eq., 291.

(6) L. B., 7 E. and I., 27.

(7) I. L. R., 8 ALL., 486.

(8) I. L. R., 10 ALL., 85.

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interest annually, and if I do not pay interest in any year, the interest would become principal, and interest at Re 1-8 per cent. per mensem would be charged by the creditor. I have for the creditor's satisfaction, hypothecated a  $1\frac{1}{2}$  biswa zamindari share in the aforesaid Kalhor Bajhana. I shall not transfer it in any way so long as the full amount is not paid off. If I do so, it shall be illegal. Whatever money I shall pay on account of interest, I shall get it endorsed on the bond. There would be no necessity for a separate receipt. If I do not pay the full amount, principal and interest, within the prescribed term, the creditor shall be entitled to recover his money from the property hypothecated thereunder, as also from other moveable or immoveable properties belonging to me. I and my heirs shall have no objection to it. I have therefore made these few presents by way of hypothecation bond so that they may serve as evidence and be of use when needed."

Under that bond the principal and interest agreed to be paid by it became payable on September 24th, 1881. This suit was instituted on January 14th, 1888, *i.e.*, more than six years from the due date of the bond. The Subordinate Judge gave the plaintiff a decree, but misunderstood the provision as to compound interest. He disallowed the claim for interest or damages *post diem*. The plaintiff has brought this appeal. It appears to us quite plain that the meaning of this contract is that whenever in any year default was made in the payment of the interest, the interest due for that year should be added to the principal, and that after the first default the interest payable should be at Re. 1-8 per cent. per mensem, and not at the rate of Re. 1-2 per cent. per mensem. In other words, the contract provided that during the contract period there should be rests, and the unpaid interest should be added to the principal, and that in case of default of payment of interest during the contract period, the rate of interest should be increased. No interest was paid during the contract period. The decree below must be varied by adding Rs. 440-12 to the sum decreed in respect of interest unpaid during the currency of the contract, and interest at the increased rate to the 4th January 1881.

Pandit *Ajudhia Nath*, for the appellant, contended on the other branch of the case, that impliedly the parties contracted that interest should be payable *post diem*, and if we do not so read the deed, then that damages should be allowed in lieu of interest, that in such case the damages are a charge on the estate, and art. 116 of sch. ii of the Limitation Act would not apply, and in any event that his client was entitled to damages for the six years immediately preceding the commencement of this action. In support of his contention that interest was payable after due date, he referred to the case of *Chhab Nath v. Kamta Prasad* (1). That case and the case of *Baldeo Panday v. Gokal Rai* (2) were considered by us in a judgment which we delivered on March 7th, 1889, in the case of *Narain Lal v. Chajmal Das*. We do not think it necessary to repeat what we said in that case as to those authorities. We adhere to the views there expressed on that subject. It is plain that there was here no express agreement that interest should be paid *post diem*. It is not contended that there was any such express agreement, and it is equally plain to us that there is nothing in the contract from which we can or ought to imply that the parties intended that interest *post diem* should be payable. For our part we do not see why a contract to pay interest *post diem* on a mortgage ought to be implied by a Court in India when the parties to the written contract have not expressed any such intention in the contract which they executed. This is particularly the case when we find, as here, that they did provide in very clear terms for the payment of interest and compound interest during the term of the mortgage. It would have been easy by the use of a few apt words inserted in the written contract for the parties to have expressed a covenant that interest should be payable *post diem*, if such they had intended the contract to be. In our opinion there was here no implied contract to pay interest *post diem*. As to the limitation which applies in cases of this kind where damages are sought for the breach of a contract to pay the principal on the due date we considered that matter at some length in the case of *Mansab Ali v.*

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(1) I. L. R., 7 All., 333.

(2) I. L. R., 1 All., 603.



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*Gulab Chand* (1), and we would not again consider the question if it had not been for the vigour with which the Hon. Pandit *Ajudhia Nath* contended that in that judgment we were mistaken as to the law. A Full Bench of this Court in *Husain Ali Khan v. Hafiz Ali Khan* (2) as we think rightly, applied art. 116 of sch. ii of the Limitation Act (XV of 1877) to a suit on a registered bond for the payment of money. Now, if interest as such is not payable after the due date of a mortgage either by express or implied agreement, the mortgagee can only seek compensation for the non-payment of the principal on the due date by claiming damages for the breach of the contract. It may be said that those damages are given in lieu of interest. Call such damages by any name one likes, they are damages for breach of contract, and not interest payable in performance of a contract, and unless there is something to make art. 116 of sch. ii of the Limitation Act inapplicable, such damages cannot be awarded or given by the Court unless the suit in which they are claimed is brought within six years from the time when the contract, for the breach of which the damages may be awarded, was broken. The contention of the Pandit *Ajudhia Nath* leads one to ask oneself whether there is some magic about damages for the non-performance by a mortgagor of his contract to pay on the due date, which takes the damages which may be awarded for a breach of that contract out of the ordinary category of damages, and out of the purview of art. 116 of schedule ii of the Limitation Act. It is not easy to understand the Pandit's contention. It is that damages for a breach by a mortgagor to pay on the due date are, from the date when the contract is broken or even before they have been ascertained or decreed, a charge upon the property hypothecated, and being such a charge, article 116 does not apply to them. It is not necessary here to consider whether if a Court in a suit on a hypothecated bond did decree damages for such a breach in a case in which such damages could be decreed, the damages so decreed would or would not thereby become a charge on the property hypothecated, or whether if damages so decreed became a charge upon the hypothecated property, the charge so created would or would not take

(1) I. L. R., 10 All., 85.

(2) I. L. R., 3 All., 600.

priority over a second mortgage subsequent in date to that for the breach of which the damages were decreed, but prior in date to the commencement of the suit in which such damages were claimed, or upon what principle such priority could or could not be decreed, or whether a Court could or could not declare such damages to be a charge upon the hypothecated property. Unless in some way the damages which, during the six years (to take this case) following September 24th, 1881, were unascertained and undecreed, and in respect of which no claim had been made within those six years, could in some way by relation back from a decree passed in a suit commenced after the period of limitation had expired, be held to be a charge upon the land from the date of breach, we fail to see how we, by our decree on the 11th June 1889, could create a charge on this hypothecated property in respect of damages, the right to sue for which had, by reason of the Indian Limitation Act, been determined prior to the commencement of this suit. That is what it appears to us we are asked to do here. The learned Pandit has cited several authorities to us in the course of his argument. He has referred us to Fisher on Mortgages (14th ed.) paragraphs 1484, 1485, 1487, 1488. We see nothing in any of those paragraphs to support his contention. The first case to which he referred us was *Price v. The Great Western Railway Co.* (1). All that is to be said about that case is that the learned Barons of the Exchequer were of opinion that the document in question there showed that the parties intended that the interest claimed should be paid. That was the inference they drew from the document. The next case was the case of *Morgan v. Jones* (2), and there the Chief Baron, and apparently the other Barons of the Exchequer, considered that the agreement in the document to pay the interest was evidence to go to the jury, that interest was to be payable *post diem*. We were then referred to the case of *Gordillo v. Weguelin* (3). That case turned apparently more on the facts and dealings between the parties than on anything else. The next case was a case *in re Kerr's Policy* (4) in which James, V.C., held that the deposit of title deeds to secure

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(1) 16 L. J. Exch., 87.

(3) L. R., 5 Ch. D., 237.

(2) 22 L. J. Exch., 232.

(4) L. R., 8 Eq., 331.

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a loan is to be considered as an agreement to execute a mortgage of the property comprised in the deeds with interest ; i.e., he inferred from the deposit of the title deeds a contract to execute a mortgage under which the parties would contract to pay interest. Here the parties have not contracted to pay interest, although they have executed a mortgage. The next case was *Lippard v. Ricketts* (1). In that case Vice-Chancellor Bacon said, referring to the case in L.R., 8 Eq., p. 331 :—"In the case of *Kerr's Policy*, the Court seems to have proceeded on the theory that a debt secured by an equitable mortgage will, unless something is said or may be implied to the contrary, carry interest ; and it seems to follow that when the Court has once decided that there is a charge, the sum charged must bear interest " (p. 194). The Pandit also referred to a case in the House of Lords—*Cook v. Fowler* (2). That case we have already commented upon in the case of *Mansab Ali v. Gulab Chand* (3). The next case relied upon by the Pandit was *Bishen Dial v. Udit Narain* (4). The hypothecation bond in that case was somewhat similar to that in the present, and there Mr. Justice Straight and Mr. Justice Mahmood held that the plaintiff's remedy for the non-payment of the bond on the due date was a suit for damages, and as that part of the case had not been dealt with by the Court below, they remanded issues on the subject of damages. No one appears to have suggested to them that the damages which were being claimed were apparently barred by limitation. On the remand no question was raised as to limitation, and the parties left it to the discretion of the District Judge to say what damages should be allowed. On the return to the remand a decree was passed on that basis in the appeal by the consent of counsel. Consequently on this particular point that case is not an authority against the view which we hold. Many of the cases which have been cited were decided by the Judges on the construction which was put in each case on the particular document in the case. We can only say, as we have more than once pointed out, that there is considerable danger in deciding one case by the construction put in another suit on another

(1) L. R., 14 Eq., 291.

(3) I. L. R., 10 All., 85.

(2) L. R., 7 E. and I., 27.

(4) I. L. R., 8 All., 496.

and a different bond. This was a danger forcibly pointed out by Sir George Jessel, late Master of the Rolls in England (1). In our judgment to which we have already referred, we have explained as well as we could that, in a case like this, there is one breach of the contract, namely, the non-payment on the day agreed upon, and that there is no question of continuing or successive breaches. That was a breach once and for all. The decree will be varied by increasing the sum of Rs. 2,156 by Rs. 440-12, giving a total decree for Rs. 2,596-12. The appellant will have proportionate costs, so far as he has succeeded, and will have to pay costs so far as he has failed.

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*Decree modified.*

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, and Mr. Justice Mahmood.*

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January 18.

ASHFAQ AHMAD AND OTHERS (PLAINTIFFS) v. WAZIR ALI AND OTHERS  
(DEFENDANTS).\*

*Mortgage—Redemption by co-mortgagor—Suit by other mortgagors against redeeming mortgagor for redemption of their shares—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 144, 148.*

In 1828 one of several co-mortgagors redeemed an usufructuary mortgage executed in 1822 and obtained possession. The other mortgagors brought a suit against the heir of the redeeming mortgagor in 1886 for redemption of their shares in the mortgaged property.

*Held* that the limitation applicable to the suit was that provided by art. 148, sch. ii, of the Limitation Act (XX of 1877); that time ran not from the date of the redemption in 1828, but from the time when it would have run against the original mortgagor if he had been a defendant, i.e., the date of the original mortgage of 1822,

\* Second Appeal No. 403 of 1887 from a decree of T. Benson, Esq., District Judge of Saharanpur, dated the 4th December, 1886, reversing a decree of Shah Amjad-ullah, Munsif of Deoband, dated the 23rd June, 1886.

(1) The judgments of Sir George Jessel, M. R., above referred to, regarding the danger of construing a document with reference to previous decisions construing other documents, are probably *Aspden v. Seddon* (L. R., 10 Ch. A., 394: 44, L. J. Ch., 368), and *Southwell v. Bowditch* (L. R., 1. C. P. D., 377: 45, I. J. C. P., 630). See also *Robinson v. Evans* (43, L. J. Com. Law., 83), *Athill v. Athill* (L. R., 16 Ch. D., at p. 228, per Jessel, M. R.) and *in re Tanquerly-Willauve*

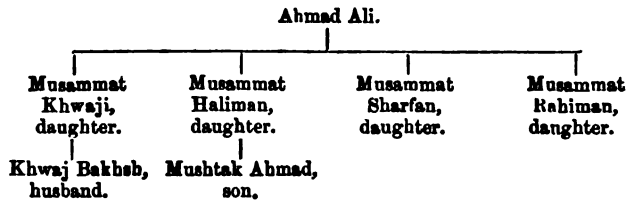
and *Landan* (L. R., 20 Ch. D., at p. 481, per Brett, L. J.). A similar principle has been laid down regarding the danger of deciding questions of fact with reference to previous decisions upon other questions of fact: see *Ecclesiastical Commissioners of England v. King* (L. R., 14 Ch. D., at p. 225, per Brett, L. J.) and *Queen-Empress v. Gobardhan* (L. R., 9 All., at pp. 555, 556, per Edge, C. J.)

1889 and that the suit was therefore barred by limitation. *Umr-un-nissa v. Muhammad Yar Khan* (1) explained. *Nura Bibi v. Jagat Narain* (2) and *Ram Singh v. Baldeo Singh* (3) referred to.

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THE facts of this case are fully stated in the following order of reference :—

MAHMOOD, J.—In order to explain the facts which are necessary to be borne in mind in considering the question of law raised in this case, the following geneological table may be stated :—



The suit relates to four properties all of which are stated to have belonged to Ahmad Ali, the common ancestor of the parties ; and it is further stated in the plaint that he mortgaged the properties separately under the following deeds :—

- (1) Property No. I under a deed executed on 2nd Jamadi-ul-awal, 1236 Hijri, corresponding with 6th January, 1821.
- (2) Property No. II under a deed executed on 4th Ramazan, 1238 Hijri, corresponding with 16th June, 1823.
- (3) Property No. III under a deed executed on 14th Shawal, 1237 Hijri, corresponding with 5th July, 1822.
- (4) Property No. IV under a deed executed on 7th Shawal, 1230 Hirjri, corresponding with 12th September, 1815.

It is stated in the plaint that these various properties were mortgaged to different mortgagees, but that all such mortgages were usufructuary, and the various mortgagees were duly placed in possession.

Ahmad Ali died some time in 1825, leaving his four daughters as his heirs, and these also subsequently died. It is then alleged

- (1) I. L. R., 3 All., 24.
- (2) I. L. R., 8 All., 295.
- (3) Weekly Notes, 1885, p. 300.

that Khwaj Bakhsh, the husband of Musammat Khwaji, and as such having inheritance in her share, redeemed the whole of the aforesaid mortgages in the following manner:—

- (1) Property No. I redeemed in 1837,
- (2) „ No. II „ „ 1837,
- (3) „ No. III „ „ 1828,
- (4) „ No. IV „ „ 1861,

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and obtained possession of the entire rights in these mortgaged properties.

The plaintiffs are the heirs and descendants of Musammat Haliman through her son Mushtak Ahmad, and they assert that they are entitled to her one-fourth share in all the four properties above mentioned. The present suit was instituted against the defendants who are the descendants of the other three daughters of Ahmad Ali, the principal of whom are in possession under the redemption of the mortgages by Khwaj Bakhsh as above-mentioned.

The object of the suit was to recover possession of the one-fourth share which the plaintiffs claim by inheritance from Musammat Haliman and also for recovery of mesne profits, upon the allegation that the mortgages having been executed anterior to the repeal of the usury laws by Act XXVIII of 1855, the mortgage-money due on the four above-mentioned mortgages had been liquidated from the usufruct of the mortgaged property, leaving a balance of mesne profits in favor of the plaintiffs.

The suit was resisted by a total denial of the plaintiffs' allegations as to the mortgages and their redemption by Khwaj Bakhsh, and upon this allegation the defendants further pleaded that their possession, derived by inheritance from Khwaj Bakhsh, had all along been adverse, and that the suit was barred by twelve years' limitation, and even by the sixty years' limitation provided for redemption, because more than 60 years had elapsed since the alleged mortgages by Ahmad Ali, the suit not having been instituted till the 5th of February, 1886.

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The Court of first instance decreed the claim in respect of property No. III, to which the mortgage of 14th Shawal, 1237 Hijri (5th July, 1822), related, and to that extent decreed the claim, together with mesne profits, and dismissed the rest of the suit, holding that the other three mortgages were not proved by the plaintiffs.

From the first Court's decree the defendants appealed to the lower appellate Court and the plaintiffs preferred objections under s. 561 of the Criminal Procedure Code in respect of so much of the claim as had been dismissed by the first Court. The learned Judge of the lower appellate Court had therefore before him the entire suit, that is to say questions relating to all the four mortgages above mentioned. He has, however, not gone into the merits of the whole case, and has dismissed the whole suit by decreeing the defendants' appeal before him and dismissing the cross objections of the plaintiffs.

The ground upon which the learned Judge has dismissed the whole suit is limitation, and in doing so he has dealt especially with the mortgage of 5th July, 1822, relating to property No. III which had been found to have been redeemed by Khwaj Bakhsh in 1828 from the original mortgagee.

The learned Judge has held that: "The respondents mortgagors (plaintiffs) cannot claim that the transaction of 1828 was a mortgage on their part, inasmuch as they were in no way parties to the transaction; that they can only claim a right to redeem on the theory that defendant appellant is the representative of the original mortgagee against whom the right to sue began to run from 1822; that accordingly the suit is barred by art. 148 of the Limitation Act; and that any other theory involves this, that defendant appellant in redeeming respondents' (plaintiffs') share of the estate in 1828 was acting adversely to their proprietary rights, and in that case the suit would be barred by art. 144."

It was upon these grounds that the learned Judge dismissed the suit in respect of the mortgage of 5th July, 1822, and it was upon the same ground that he disallowed the plaintiffs' cross-objections relating to the other mortgages—all of which are older than 60 years.

This second appeal has been preferred from the whole decree, but  
 Mr. *Abdul Majid*, on behalf of the appellants, and Mr. *Sundar Lal*,  
 on behalf of the respondents, have addressed their arguments as to  
 limitation with special reference to the mortgagee of 5th July 1822. 1889  
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The effect of Mr. *Abdul Majid*'s argument is that inasmuch as a mortgage is indivisible, and a co-mortgagor cannot redeem his own share, except by redeeming the whole mortgaged property, including the shares of his co-mortgagors, Khwaj Bakhsh's action in redeeming the entire mortgage of 5th July 1822, amounted to a mortgage in his favour so far as the plaintiffs' share was concerned; that since such redemption did not take place till 1828, the period of 60 years' limitation under art. 148 of the Limitation Act (XV of 1877) applies to the case, and that period must be calculated not from the date of the original mortgage of 5th July 1822, but from 1828 when Khwaj Bakhsh, by redeeming the whole property, obtained possession of the plaintiffs' share therein. Upon these steps of reasoning, the learned counsel argues that the suit was not barred by limitation. Further, he argues that if art. 148 of the Limitation Act is not applicable to the case, then this suit, not being regarded a suit for redemption, must be taken to be a suit for possession of immoveable property within the meaning of art. 144 of the Act, and even in this event the suit would not be barred by limitation, because the defendants' possession having initiated in the redemption of 1828 could not be regarded as adverse in respect of the plaintiffs' share, which could not have come into their possession, but for the redemption of 1828, which redemption, far from repudiating the plaintiffs' title, must have proceeded upon a recognition of the plaintiffs' title.

Similarly, Mr. *Sundar Lal* has addressed an alternative argument to me. The learned pleader argues as the first alternative that art. 148 of the Limitation Act applies to the case, but then the limitation must be counted from 5th July 1822, when the original mortgage was made and the suit would thus be barred by limitation, for the last column of that article gives no indication of any starting point other than that which would be applicable to suits against the mortgagee under the terms of the mortgage itself. As



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the other alternative, the learned pleader contends that art. 148 has no application to the case, and that the suit falls under art. 144 and as such is governed by 12 years' limitation calculated from the time when the defendants' possession became adverse to the plaintiffs, which in this case must be taken to have commenced at the redemption of 1828, and if not, the case cannot be decided without a clear finding as to when the defendants' possession became adverse to the plaintiffs.

A third and a minor argument was also addressed to me by Mr. *Sundar Lal* on behalf of the respondents, namely, that the Lower Appellate Court has not clearly found that the plaintiffs have any such rights as would entitle them to the status of co-mortgagors of the mortgage of 5th July 1822. I will not dispose of this contention before deciding the question of limitation raised by the arguments of the parties.

That question depends upon the determination of the following points :—

(1) Is this suit governed by art. 148 or art. 144 of the Limitation Act ?

(2) If by art. 148, is the starting point of the period of limitation, the date of the mortgage of 1822 or the date of the redemption of 1828.

(3) If art. 144 applies, is the defendants' possession acquired under the redemption of 1828 to be taken as adverse to the plaintiffs from that date ?

In order to dispose of these questions, it is necessary to premise that I take it to be a well settled rule of law that when the equity of redemption vests in more than one mortgagor, any one of them can redeem the whole property on payment of the full mortgage debt ; that the mortgagor who redeems the entire property obtains possession thereof, subject to the right of his co-mortgagors, to recover their shares from him on paying their proportion of the mortgage debt and of the expenses incurred in redemption by the co-sharer who has redeemed the original mortgage. This was a well recog-

nized rule of law before the passing of the Transfer of Property Act (IV of 1882), and it has been recognized by that enactment in s. 95 which also recognizes another well known rule of law that the mortgagor who thus redeems the share of his co-mortgagors has a charge upon their shares for the proportionate amount which he has paid on behalf of his co-mortgagors. There are many old cases cited in the 7th edition of Macpherson's Law of Mortgage, pp. 342 and 343, and to those may be added the case of *Asansab Ravuthan v. Vamana Rau* (1).

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It was upon the same principle that my brethren Straight and Tyrrell, in the case of *Nura Bibi v. Jagat Narain* (2), held that a co-mortgagor who obtains possession by redeeming the whole mortgage assumes the possession of mortgagee, and that the other co-mortgagors could sue to redeem their shares and that such suit would be governed by art. 148 of the Limitation Act (XV of 1877). That case is undoubtedly an authority in favour of Mr. *Abdul Majid's* contention so far as that contention seeks to apply art. 148 to the present suit. But as pointed out by Pandit *Sundar Lal*, the case before my learned brethren was one in which the original mortgage redeemed by the defendant was not proved to be older than 60 years, and they therefore did not decide the question as to the period from which the starting point of the limitation of 60 years was to be calculated. They said :—"Such a suit naturally falls within the definition of article 148 of Act XV of 1877; and we fail to appreciate how it is possible for one of two mortgagors redeeming the whole mortgaged property behind the back of the other, to change the position of that other to something less than that of a mortgagor, or to abridge the period of limitation within which he ought to come in to redeem."

Relying upon this passage, Mr. *Sundar Lal* argues that the essential part and the turning point of the *ratio decidendi* of that ruling was the circumstance that the plaintiff had sued within 60 years of the original mortgage, which had been redeemed by the defendant, and that in this view the ruling supports the case of the

(1) I. L. R., 2 Mad., 223.

(2) I. L. R., 8 All., 295.

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respondents rather than that of the appellants. I think this contention is sound, and that the ruling just mentioned is not on all fours with the present case, because in that case the exact question now before me did not and could not arise, *vis.*, whether in cases where the original mortgage is older than 60 years, and could not be redeemed under art. 148 by the plaintiff mortgagor, if no intermediate redemption had been made by the co-mortgagor defendant, the date of such redemption furnishes a fresh starting point of a 60 years' period of limitation under art. 148.

Again, as far as the argument of the parties with reference to the applicability of art. 144 of the Limitation Act is concerned, reference has been made to a Full Bench ruling of this Court in *Umr-un-nissa v. Muhammad Yar Khan* (1), which would go to show that when a co-mortgagor obtains possession by redeeming the whole mortgage, his possession from the date of such redemption becomes adverse to the other co-mortgagors, and that their suit to recover possession of their shares would be governed by the 12 years' limitation prescribed by art. 144 of the Limitation Act. The ruling is no doubt a binding authority upon me sitting here as a single Judge; but as pointed out by my brethren Straight and Tyrrell, "the applicability of art. 148 to the facts of that case was never raised or considered, the arguments and *ratio decidendi* being confined to the question of whether, assuming art. 144 to supply the limitation, there had been adverse possession on the part of the defendants which would defeat the plaintiff's suit;" and it was, indeed, upon this ground that those learned Judges felt themselves at liberty to apply the 60 years' limitation prescribed by art. 148 and not the 12 years' limitation under art 144, to a case in which the defendants co-mortgagors of the plaintiff had redeemed the whole mortgage 21 years before suit and had since been in possession.

Mr. *Abdul Majid* in supporting his contention that the redemption of 1828 must be taken to amount to a fresh mortgage and as such furnishing a new starting point of 60 years' limitation under

(1) I. L. R., 3 All., 24.

art. 148 relies upon the dictum of Petheram, C.J., in *Ram Singh v. Baldeo Singh* (1) where the learned Chief Justice observed :—

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“ Art. 148 is, in my opinion, intended to apply to any person in possession of immoveable property which he is entitled to hold so long as an amount due to him, for which that property is charged, remains unpaid. The debtor, on payment, is entitled to possession: and this is in effect a redemption of the land or share in the land, the relation of mortgagor and mortgagee, in fact, as described in art. 148. Therefore I am of opinion the relation of mortgagor and mortgagee, as described in art. 148, did exist, and that the 60 years' limitation applies. I think also that the right to redeem must be reckoned from the year 1821 as the relationship was then created.”

The report of the case in which these observations were made shows that all that had occurred in 1821 was a decree which the co-sharers of a village had obtained against the purchaser at a sale or arrears of Government revenue, which decree, setting aside the sale, directed that the co-sharers should obtain possession on payment of a certain sum to the purchaser; and subsequently one of such co-sharers paid off the whole decretal amount and obtained possession. Mr. *Abdul Majid* argues that if the decree of 1821 could establish the relation of mortgagor and mortgagee in that case, *a fortiori* in this case the relation of mortgagor and mortgagee was established between the parties to this litigation when the redemption of 1828 was made, and that therefore that time must be regarded as the starting point of 60 years' limitation in this case under art. 148 of the Limitation Act. Again, the learned counsel, so far as his argument relates to the applicability of art. 144, calls my attention to a ruling of Mr. Justice Oldfield in *Karimdad Khan v. Faizan Bibi* (2) where the learned Judge held that in cases of one co-mortgagor obtaining possession by redemption of the whole mortgaged property, such possession could not, *ipso facto*, be taken to be adverse to the other co-mortgagors, and that the suit would not be barred even though redemption had taken place more than

(1) Weekly Notes, 1885, p. 300.

(2) Weekly Notes, 1885, p. 51.

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12 years before suit. I delivered no separate judgment in that case, and concurred in the order which that learned Judge made, but the report does not show, and I do not remember that our attention had been called to the Full Bench ruling of this Court in *Umr-un-nissa v. Muhammad Yar Khan* (1), which as I now read it seems to me to be somewhat irreconcilable with the *ratio* upon which the judgment in the case before Oldfield, J., and myself just cited proceeded.

In this state of the case law, and in view of intrinsic difficulties which have arisen in this case, I should ordinarily have regarded it as my duty to refer the case to a bench consisting of more than one Judge, by availing myself of the statutory provision to that effect which the rules of this Court, dated the 11th June, 1887, contain. But this Court, as I have recently reason to think, is not unanimous as to the extent of the discretionary power which those rules imply in matters of reference. I shall therefore direct that the case be laid before the learned Chief Justice, who, under s. 14 of the statute 24 and 25 Vic., c. 104, has extensive power in that behalf, for such orders as he deems fit to pass as to whether this case may be referred to a Division Bench consisting of two Judges, or should be disposed of by me sitting as a single Judge. I direct accordingly.

STRAIGHT, J.—As the accuracy or otherwise of a judgment of Petheram, C.J., when Chief Justice of this Court is in question, I think it desirable that the proposal of my brother Mahmood should be adopted. I accordingly support his recommendation.

The case was ordered by Edge, C.J., to be laid before a bench consisting of himself and Straight and Mahmood, JJ.

Maulvi *Abdul Majid* and Pandit *Moti Lal Nehru*, for the appellants.

Pandit *Sundar Lal*, for the respondents.

EDGE, C.J. —This was a suit for redemption of mortgage. The original mortgage was a usufructuary mortgage of 1822. One of the mortgagors redeemed the whole of the property in 1828. This

(1) I. L. R., 3 All., 24.

suit was brought against his heirs on the 5th February, 1886. The lower appellate Court dismissed the suit on the ground, that it was barred by limitation. In my opinion the limitation applicable in a case of this kind is the limitation which would have been applicable if the original mortgagee or his heirs had been the defendants to the redemption suit, that is, if art. 148 of the Limitation Act applies, the period does not run from the date of the redemption of the whole property by one of the co-mortgagors, but from the time it would have run against the original mortgagee if he had been a defendant in the suit. As I understand the law, when one of two or more co-mortgagors redeems the whole, he as to the portion which represents the interest of his co-mortgagors stands in the shoes of the mortgagee from whom he redeems, and standing in those shoes, it appears to me that he has got the same rights and the same liabilities. If art. 148 applies, as I think it does, this suit is barred by time. If the ruling of the Full Bench in the case of *Umr-un-nissa v. Muhammad Yar Khan* (1) be correct and exhaustive, then also the suit is barred, as more than twelve years have run since the date of the redemption of the mortgage by the ancestor of defendants. So in either case the plaintiff's suit must fail. The ruling of the Full Bench above referred to was explained by my brother Straight and my brother Tyrrell in the case of *Nura Bibi v. Jagat Narain* (2). It appears from that explanation that the attention of the Full Bench was not drawn as to the question whether art. 148 of the Limitation Act was applicable to the case. There the attention of the Full Bench having been confined to the article before them, the result arrived at was that art. 144 was held applicable. This appeal therefore must be dismissed.

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STRAIGHT, J.—The facts out of which the question raised by this reference arose are very fully stated in the referring order of my brother Mahmood, and it is wholly unnecessary to repeat them now. The learned Chief Justice has summarised the position of the parties to the litigation out of which this appeal arose, by saying that this is a suit by the plaintiffs, appellants, before us, for redemp-

(1) I.L.R., 3 All., 24.

(2) I.L.R., 8 All., 295.

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tion of their share of certain property mortgaged in the year 1822, from the defendants respondents who are the representatives of one of the original mortgagors, who in the year 1828 redeemed the whole of the mortgaged property. The three questions raised by my brother Mahmood in his referring order are:—

(1) Is this suit governed by art. 148 or art. 144 of the Limitation Act?

(2) If by art. 148, is the starting point of the period of limitation the date of the mortgage of 1822, or the date of the redemption of 1828?

(3) If art. 144 applies, is the defendants' possession acquired under the redemption of 1828, to be taken as adverse to the plaintiffs from that date?

It will be convenient for me at once to deal with the obvious matter that was passing through the mind of my brother Mahmood at the time he made the reference of these questions, with regard to the applicability of art. 144 to facts like those disclosed here. No doubt what was present to his mind was a decision of the Full Bench passed in the year 1880 and reported in *Umr-un-nissa v. Muhammad Yar Khan* (1). I have already, as the learned Chief Justice has observed, taken occasion, in conjunction with my brother Tyrrell, in the case of *Nura Bibi v. Jagat Narain* (2), to explain the circumstances under which that particular ruling was delivered by the Full Bench. Having again refreshed my memory by reference to it, I am convinced that I was right in saying that the whole argument of the Full Bench proceeded upon the assumption that art. 144 of the Limitation Act was the article applicable to those particular facts, and assuming that particular article applicable, the question was whether, as is stated in the order of reference of the two learned Judges, there had been such physical possession as would lay the foundation for finding adverse possession. I am quite convinced that the equitable principle which was then recognized, under which a co-mortgagor

(1) I.L.R., 3 All., 24.

(2) I.L.R., 8 All., 295.

redeeming for his other mortgagors was entitled upon redemption of the whole mortgage to hold their shares as against them as security for the mortgage, was never referred to or discussed, and there was at that time no statutory provision in force, which could have been brought to the attention of the Judges of the Full Bench, to show that article 148 was the limitation article applicable. Therefore, in so far as there is anything in that case to militate with the contention now raised, it must be taken that that case never did decide, and must not be regarded as an authority for deciding that article 148 is not applicable to such facts as we have here. Therefore, it must be dismissed from consideration in dealing with the questions submitted to us.

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Then arises the question whether art. 148 is applicable, and if so, from what date does the limitation begin to run. Does it run from the date of the original mortgage, or does it run from the date of the redemption of the whole mortgage by one of the co-mortgagors? As to art. 148 being applicable, I have no doubt I have already committed myself to that view in the case of *Nura Bibi v. Jagat Narain* (1), and there have been several other rulings to the same effect, among others one reported in *Weekly Notes* of 1886, p. 152 (*Raghubar Sahai v. Bunyad Ali*). Further, even before the Transfer of Property Act came into operation, I took the view that a co-mortgagor redeeming the whole mortgage stood in the shoes of the original mortgagee, and was entitled to all the rights and the incidents connected with his estate. The principle that underlies that is, that he having paid off the obligation to the creditor is entitled to take advantage of all the incidents connected with the security as it stood in the hands of the mortgagee, or, in other words, he is entitled to all the rights and incidents connected with the mortgage as they were in the hands of the mortgagee at the time the redemption took place. Among others, he cannot say that a new mortgage transaction commenced from that particular date, but his position as mortgagee stands upon the same footing as it would have if the original mortgagee had assigned over to him by sale his mort-

(1) I. L. B., 8 All., 295.



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gage interest. Not only do I think that a co-mortgagor redeeming the whole mortgage stands in the position of the original mortgagee, but that time runs from the date of the original mortgage. No doubt this view is inconsistent with one expressed by the late Chief Justice, Sir Comer Petheram, in the case of *Ram Singh v. Baldeo Singh* (1). That learned Judge was of the same opinion as I am as to the applicability of art. 148 to the facts then before him. But it does not appear to have been seriously discussed before him as to what was the precise date from which the limitation would run. Mr. *Abdul Majid* is entitled to use that judgment in his favour, and it is entitled to all the respect which every utterance of that learned Chief Justice deserves. But I cannot myself agree with the view that the limitation runs from the date when redemption took place. It must, in my opinion, relate back to the date of the original mortgage, and upon this I have explained my reasons in the case of *Nura Bibi v. Jagat Narain* (2). The conclusion I have arrived at is the same as that of the learned Chief Justice, *viz.*, that this suit was barred and that this appeal must be dismissed with costs.

MAHMOOD, J.—The facts of the case, as also the points of law raised by the arguments of the parties before me when the case first came up before me in the Single Bench, are fully stated in my order of the 17th July 1888, and I regard what I then said as a portion of my judgment to-day.

That order shows that, at any rate, the case was a fit one for being disposed of a Bench consisting of more than one Judge, and it was in consequence of that circumstance that the case was laid before my brother Straight and myself, and by our order of the 6th December 1888, it was laid before the learned Chief Justice for consideration as to whether it should not go before a Bench of three Judges. It is in consequence of this circumstance that this is a third time that this Court is hearing the case, and it has not been due to any other cause than my desire to obtain such authoritative ruling upon the points raised in the case as this Court can give.

(1) Weekly Notes, 1885, p. 300.

(2) I. L. R., 8 All., 295.

The points which arise in the case have been so completely dealt with by the learned Chief Justice and my brother Straight that I should be unnecessarily taking up their time if I dwelt upon the same points or made any endeavour to give expression to any exposition of the law which would minutely deal with the various cases that may arise under it. The question, however, upon which the fact of the case turns requires two things,—first, that it should be held by us that art. 144 of sch. ii of the Limitation Act has no reference to suits of this character, and secondly, that suits of this character are governed by art. 148. Upon both these questions I, who am never content with dealing with any case without dealing also with the *ratio, viz.*, the essential steps of reasoning, upon which the judgment proceeds, have no hesitation in saying with all deference that the judgment of the Full Bench in *Umr-un-nissa v. Muhammad Yar Khan* (1) proceeds upon a theory of law as to the application of the article 144, which I find impossible to accept, notwithstanding the clear distinction which my learned brother Straight drew in the case of *Nura Bibi v. Jagat Narain* (2), the result of which we have held to-day is to say that the Full Bench ruling need no longer be referred to for the purposes of finding out the periods of limitation for suits.

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Again, it is also clear, and I do not wish to add a single word to what has fallen from my brother Straight upon the subject, that the ruling referred to in my referring order, *viz.*, *Ram Singh v. Baldeo Singh* (3), cannot possibly be consistent with the *ratio* upon which our judgment proceeds. The truth is, as I understand the law, that there are various manners and methods whereby a person may stand in the shoes of a mortgagee. There may be a case such as that of an assignee, or there may be a case such as that which the broad principle of equity known as subrogation involves. A co-sharer suing for the redemption of the whole of the property and obtaining redemption thereof is not a person in adverse proprietary possession, as the Full Bench ruling would probably require. He is simply by subrogation on the same footing as an ordinary person would

(1) I. L. R., 3 All., 24.

(2) I. L. R., 8 All., 295.

(3) Weekly Notes, 1885, p. 300.

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When in a suit the question arises whether or not a co-sharer can obtain his share from a redeeming co-sharer, the case to my mind is a suit such as art. 148 contemplates, and such a suit is governed by the sixty years' period. In the present case the original mortgage was so old as 5th of July, 1822. There was no endeavour made to prove that the redemption which took place in 1828 was other than an ordinary redemption by one co-sharer of the other co-sharer's property. The present defendants represent the right of the redeeming co-sharer, and they are entitled to rely upon the same limitation as art. 148 would require.

There is, however, because it is on account of that reference of mine that the case has come up before us, one point more that I wish to add. The reference, of course, relates to four properties as mentioned in my referring order, and what we have held with regard to this mortgage renders it unnecessary for us to consider the other mortgages mentioned in the judgments of the Courts below. The view we have now taken defeats the whole suit. The result is exactly what the learned Chief Justice and my brother Straight have said, *viz.*, that this appeal stands dismissed with costs.

*Appeal dismissed.*

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Brodhurst, and Mr. Justice Mahmood.*

PARMANAND MISR (DEFENDANT) v. SAHIB ALI AND OTHERS (PLAINTIFFS).\*

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*Mortgage, usufructuary—Redemption—Limitation—Pleading—Burden of proof—Civil Procedure Code, s. 50—Act XV of 1877 (Limitation Act), s. 28, sch. ii, No. 148—Act I of 1272 (Evidence Act), s. 110.*

There is a clear distinction as to the *onus* of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In

\* Second Appeal No. 916 of 1887 from a decree of J. M. C. Steinbelt, Esq., District Judge of Azamgarh, dated the 15th March, 1887, modifying a decree of Babu Nihal Chand, Munsif of Azamgarh, dated the 21st September, 1886.

each case the plaintiff must plead his title, and if that title is in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. Where the defence is twelve years' adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been proved or admitted, was lost. In a suit for possession of land by redemption of mortgage, the very nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must in his plaint show the title upon which he relies, and therefore a title subsisting at the date of suit. Unless he gives *prima facie* evidence to show that his suit is within time, he fails to prove his title or subsisting right to the property.

*Phillips v. Phillips* (1), *Dawkins v. Lord Penrhyn* (2), *Radha Gobind Roy Sahab v. Inglis* (3), *Rao Karan Singh v. Rajah Bakar Ali Khan* (4), *Rajah Kishen Dutt Pandey v. Narendar Bahadur Singh* (5), *Bam Chandra Apaji v. Balaji Bhaurao* (6), and other cases referred to.

THE facts of this case are sufficiently stated in the judgment of Edge, C.J.

Babu Jogindro Nath Chaudhri, for the appellant.

Mr. Abdul Majid, for the respondents.

EDGE, C.J.—The plaintiffs-respondents here, on the 2nd July, 1886, brought a suit in the Court of the Munsif of Azamgarh for redemption of an alleged mortgage and for surplus profits. In their plaint they alleged that the ancestor of the defendant No. 2 had in the year 1242 fasli, that is to say in 1835-36, mortgaged a one anna four pie share in mauza Isapur to the grandfather of the defendant No. 1 for Rs. 150, that the mortgage was a usufructuary mortgage, and that the entire mortgage-debt had been discharged by the usufruct leaving a large surplus which they claimed. They alleged that they had purchased the rights of the defendant No. 2 in the property in question, and said that as they had not the mortgage-deed in their possession, they could not give the exact date of the mortgage.

The defendant No. 1 in his written statement denied that any such mortgage was made or that any mortgage was made in 1242 fasli. He further pleaded that, on the 31st of August, 1820, the property in question had been mortgaged to his ancestor for Rs. 325,

(1) L. R., 4 Q. B. D., 127.

(2) L. R., 4 App. Cass., 51.

(3) 7 Calc., L. R., 364.

(4) L. R., 9 I. A., 99.

(5) L. R., 3 I. A., 85.

(6) I. L. R., 9 Bom. 137.

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and that to that mortgage four other bonds representing in amount Rs. 396 had been tacked on, and that the debt had not been discharged. He also pleaded that the claim of the plaintiffs was barred by limitation.

The plaintiffs called two witnesses to prove that a mortgage for Rs. 150 had been made, and they put in evidence a *rubkar* of 1836.

The Munsif of Azamgarh, holding "that the mortgage-deed being with defendant No. 1, the burden of proving the time of mortgage, and the money for which the mortgage was made lay upon him," gave the plaintiffs a decree for possession for Rs. 113-5-3 with interest and for costs. The defendant No. 1, the appellant here, appealed from that decree to the Court of the Judge of Azamgarh. In that appeal the then Judge of Azamgarh in his judgment, found so far as is material as follows:—"The evidence on both sides is not very good. That the *rubkar* filed by plaintiffs merely shows there was a mortgage, but that is admitted, and the oral evidence by itself is hardly sufficient to warrant decreeing the claim. On the other hand, the deed of mortgage filed by defendant proves too much, for it refers to a mortgage of far more property than that claimed. Defendant No. 1 explains this by saying that perhaps part of the mortgage had been paid off, and so part of the property had been redeemed, but this is unlikely, and there is no proof whatever of it.

"Under the circumstances I agree with the lower Court that it is impossible to hold that the defendant's deed refers to the present mortgage or that the bonds he holds have been tacked on to the present mortgage. So I agree with the lower Court that the plaintiffs are entitled to recover the property, but I cannot agree with the lower Court in holding it clearly proved that the mortgage was for exactly Rs. 150, and that it is not only paid off by the profits, but that there is a large surplus; on the contrary, if this were really the case, the claim for redemption would have been preferred long ago, so I consider there is not sufficient evidence to prove that there is a surplus or how much it amounts to."

The Judge of Azamgarh on that finding dismissed the claim, so far as it related to the alleged surplus profits, and ordered each party to bear their own costs in both Courts, and to that extent modified the decree of the Munsif.

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From that decree of the Judge the defendant No. 1 has brought this second appeal.

Mr. *Jogindro Nath Chaudhri* on behalf of the defendant-appellant contended that, as the making of the mortgage alleged by the plaintiffs was in issue in the suit, it lay upon the plaintiffs to substantiate their case by at least some *prima facie* evidence of the making of the alleged mortgage, that no such *prima facie* evidence had been given, and consequently that the plaintiffs had failed to establish even a *prima facie* case that the mortgage alleged and relied upon by them in their plaint had been made, or that the suit was brought within the period of limitation prescribed by the Indian Limitation Act, 1877. He cited the following authorities:—*Rajah Kishen Dutt Pandey v. Narendar Bahadur Singh* (1), *Ratan Kuar v. Jiwan Singh* (2), *Balaji Narji v. Babu Deoli* (3), *Ram Chandra Apaji v. Balaji Bhaurao* (4), *Nura Bibi v. Jagat Narain* (5), *Bhagwan Singh v. Mahabir Singh* (6), *Pandurang Govind v. Balkrishna Hari* (7), and an unreported judgment of mine, in which my brother Brodhurst concurred, in S. A. No. 289 of 1888.

Mr. *Abdul Majid* on behalf of the plaintiffs-respondents, whilst admitting that it lay upon the plaintiffs to establish by *prima facie* evidence that the action had been brought within time, contended that such *prima facie* evidence had been given. Mr. *Abdul Majid* admitted that the Judge of Azamgarh in his judgment correctly represented the effect of the *rubkar* which was put in evidence. He referred to the following authorities:—*Radha Prasad Singh v. Bhajan Rai* (8), *Radha Govind Roy Sahab v. Inglis* (9), *Sarsuti v.*

(1) I. L. R., 3 I. A., 85.

(2) I. L. R., 1 All., 194.

(3) 5 Bom., H. C. R., A. C. J., 159.

(4) I. L. R., 9 Bom., 137.

(5) I. L. R., 8 All., 295.

(6) I. L. R., 5 All., 184.

(7) 6 Bom. H. C. R., A. C. J., 125.

(8) I. L. R., 7 All., 677.

(9) 7 Cal., L. R., 364.

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*Kunjbehari Lal* (1), and *Bhagwan Singh v. Mahabir Singh* (2), which had been cited by Mr. *Jogindro Nath Chaudhri*.

My brother Mahmood in the course of the argument suggested that as the defendant-appellant relied on limitation as a bar to the suit, it was on him to show that the suit was not brought within time and not upon the plaintiffs to show that it was, and he referred us to the case of *Rao Karan Singh v. Rajah Bakar Ali Khan* (3).

It appears to me that this being a second appeal in which we must accept the opinion of the first appellate Court as to the oral evidence, and its conclusions of fact upon the documentary evidence before it, it is necessary in the first instance to consider what was the opinion of the Judge of Azamgarh as to the oral evidence and what were his conclusions of fact upon the documentary evidence before him.

As I read his judgment, the late Judge of Azamgarh was of opinion that the oral evidence on each side was untrustworthy and unreliable, and I necessarily conclude that, holding that opinion, he discarded the oral evidence. As to the documentary evidence it is admitted that his opinion as to the *rubkar* of 1836, namely, that the *rubkar* showed no more than that there had been a mortgage was correct.

The Judge below does not suggest that the mortgage-deed of 1820 produced by the defendants was not in fact a genuine deed.

For reasons which, if this was a first appeal, would be far from conclusive to my mind, he came to the conclusion that the mortgage-deed of 1820, by which a five and half annas share in the same mauza Isapur was along with other property mortgaged, did not relate to the property in question.

He found as a fact that the plaintiffs had not proved the mortgage alleged by them, and consequently he disallowed their claim for the alleged surplus profits, but nevertheless he confirmed that portion of the decree of the Munsif which decreed possession. With all respect for the late Judge of Azamgarh, his judgment, in

(1) I. L. R., 5 All., 345. (2) I. L. R., 5 All., 184.

(3) L. R., 9 I. A. 99.

my opinion, betrays considerable confusion of mind, unless he was of opinion that the *onus* of proving the date of the mortgage alleged by the plaintiffs, that it had in fact been made, and that the plaintiffs' title and right to redeem were subsisting at the date of the suit was not upon the plaintiffs but upon the defendant who, in his written statement, had specifically denied that any such mortgage had been made.

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As I understand his judgment there was in his opinion no *prima facie* evidence of a reliable character that any such mortgage as that alleged and relied upon by the plaintiffs had ever been made, and yet in the latter part of his judgment in the passage which I have quoted he refers to the "present mortgage" as if such mortgage had been admitted or proved.

It appears to me that there is a plain and clear distinction as to the *onus* of proof between a case like this in which a plaintiff sues to obtain possession of land by redemption of a mortgage, and that in which the defence to a suit for the possession of land is twelve years adverse possession by the defendant. In each case it is for the plaintiff to plead his title, and if that title is put in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence.

In the second case, in which the defence is twelve years' adverse possession, the defendant whose title, if any, is twelve years' adverse possession, must plead and make out the title he alleges, and thus show that the title of the plaintiff which otherwise had been proved or admitted was lost. As a matter of pleading it is quite clear that a plaintiff suing for possession of land by redemption of mortgage must show in his plaint the title he intends or hopes to prove, and upon which he relies as entitling him to the relief which he asks.

By s. 50 of the Code of Civil Procedure it is enacted that the plaint in a suit must contain "(a) a plain and concise statement of the circumstances constituting the cause of action, and where and when it arose," and "if the cause of action arose beyond the period ordinarily allowed by any law for instituting the suit, the



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plaint must show the ground upon which exemption from such law is claimed."

It is enacted by s. 28 of the Indian Limitation Act, 1877, that "at the determination of the period here by limited to any person for bringing a suit for possession of any property, his right to such property shall be extinguished."

The plaintiff in such a suit as the present one must show in his plaint his title, and that involves his showing a title subsisting at the date of suit. In the present case the plaintiffs would not, in my opinion, have complied with the clear and specific requirements of s. 50 of the Code of Civil Procedure if in their plaint they had merely stated that a mortgage of the land in question had been granted to the defendant or his ancestors and that they as the assignees of the mortgagor's right were entitled to redeem on the ground that the mortgage debt had been discharged by the usufruct. Such a plaint would not show the circumstances constituting the cause of action or when it arose or in fact that any cause of action or right to sue existed at the commencement of the suit.

The subject of the kind of averments which a plaintiff should make in his statement of claim, and what it should show under the orders relating to pleading in England, which are analogous to the provisions of our Code of Civil Procedure, was much discussed in the case of *Philipps v. Philipps* (1) which was a suit of ejectment on title.

Unless the plaintiff in a suit for redemption of mortgage shows in his plaint that *prima facie* he had at the commencement of the suit a title and a right to sue then subsisting, his plaint would not, in my opinion, comply with the requirements of s. 50 of the Code of Civil Procedure. It would, in my opinion, in the result be as useless for such a plaintiff to allege in his plaint a date and circumstances of which there was no *prima facie* evidence as to allege a date and circumstances which were false. I cannot better illustrate what I consider to be the effect of article 148 of the second schedule of the Indian Limitation Act, 1877, coupled with s. 28 of that Act, and of

(1) L. R., 4 Q. B. D., 127.

the paragraphs which I have quoted from s. 50 of the Code of Civil Procedure, than by quoting from the judgment of Lord Cairns in *Dawkins v. Lord Penrhyn* (1) the following passages:—"My Lords, I consider that there can be, and ought to be, no doubt at all upon that point. The analogy which was referred to of the Statute of Frauds is not an analogy of any weight. The Statute of Frauds must be pleaded, because it never can be predicated beforehand that a defendant, who may shelter himself under the Statute of Frauds, desires to do so. He may, if it be a question of an agreement, confess the agreement and then the Statute of Frauds will be inapplicable. With regard also to the Statute of Limitations as to personal actions, the cause of action may remain even although six years have passed. It cannot be predicated that the defendant will appeal to the Statute of Limitations for his protection; many people, or some people at all events, do not do so; therefore, you must wait to hear from the defendant whether he desires to avail himself of the defence of the Statute of Limitations or not. But, with regard to real property, it is a question of title. The plaintiff has to state his title, the title upon which he means to rely, and the Statute of Limitations with regard to real property says that when the time has expired within which an entry or a claim must be made to real property, the title shall be extinguished and pass away from him who might have had it to the person who otherwise has the title by possession, or in whatever other way he may have it. Therefore, if upon the face of the bill the plaintiff states that the period allowed by the statute has expired, he states in law that his title is extinguished, unless, indeed, he can bring himself within some of the exceptions under which the statute allows his title to continue."

It is true that in *Dawkins v. Lord Penrhyn* (1), Lord Cairns was dealing with the English law as to limitation, and the rules in England as to pleading, but, in my opinion, his judgment as to the effect of the English Statute of Limitation, relating to real property would be equally applicable to the article and section of the Indian Limitation Act, 1877, to which I have referred, and his observations

(1) L. R., 4 App., Cas., 58 and 59.

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 not uninformative for us in India who have to construe and apply  
 the law as it is here.

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The very nature of a suit for possession of land by redemption of mortgage pre-supposes that the defendant or those whom he represents in title had lawfully obtained possession of the land, and the plaintiff must show in his plaint and must support his case by at least *prima facie* evidence showing his title to possession, and his right to disturb the possession of the defendant which had a lawful origin. If in such cases the mortgagor's title to the land and the right to redeem have become extinguished by lapse of time, such extinguishment was effected not by any overt act of the mortgagee, but by the mortgagor having failed to bring his suit within the time allowed by the Indian Limitation Act. Unless a plaintiff in a redemption suit give *prima facie* evidence to show that his suit is brought within the time allowed by the Indian Limitation Act, he, in my opinion, fails to show that he has a subsisting right to the property in suit or, in other words, he fails to prove his title.

On the other hand, in a suit against an alleged trespasser for possession, the plaintiff's case is that the possession of the defendant is and has been from the date assigned in the plaint as the date of the alleged trespass unlawful.

It would be a sufficient compliance with clause (d) of s. 50 of the Code of Civil Procedure for a plaintiff in such a case, for example, to state in his plaint, filed on the 10th February 1888, that he being possessed of one bigha of land in mauza Rajur, &c., was on the 1st January 1888 wrongfully dispossessed by the defendant. If the simple defence to such an action was twelve years' adverse possession by the defendant, it would, after the plaintiff had given *prima facie* proof of what amounted to a dispossession by the defendant within twelve years before suit, clearly be for the defendant to prove an adverse possession for twelve years, otherwise the plaintiff's title would stand admitted.

In my opinion, in all cases where the plaintiff's title is in issue and adverse possession of twelve years is a defence, the plaintiff must

prove *prima facie* a title, and then the defendant, if he is to succeed, must prove in fact twelve years' adverse possession. In the case of *Radha Gobind Roy Sahab v. Inglis* (1), their Lordships of the Privy Council, at page 367, are reported to have said:—"The question remains, whether the disputed land which must now be taken all to lie within the yellow line had or had not been occupied by the defendant for twelve years before the suit was instituted, so as to give him a title against the plaintiff by the operation of the statute of limitation; on this question undoubtedly the issue is on the defendant. The plaintiff has proved his title; the defendant must prove that the plaintiff has lost it by (reason of his) the defendant's adverse possession."

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It is to be observed that their Lordships in that case state that "the plaintiff has proved his title," and from other parts of their judgment I infer that the plaintiff had given at least *prima facie* evidence to show that the defendant there had not been in adverse or other possession of the land in question for twelve years before the suit. As was pointed out by Mr. Justice Oldfield in his judgment in the case of *Sarsuti v. Kunj Behari Lal* (2), *Radha Gobind Roy v. Inglis* (1) is an authority to show that when a plaintiff in a suit for possession of land has proved his title, it is for the defendant to prove the adverse possession on which he relies. In the case of *Rao Karan Singh v. Raja Bakar Ali Khan* (3) so far as this point is concerned, their Lordships of the Privy Council merely decided that although under the old law of limitation a plaintiff must have proved that he was in possession of the property in suit within twelve years before suit, yet under Act IX of 1871 he may sue within twelve years from the time when the possession of the defendant, or of some person through whom he claims, became adverse to him. I fail to see anything in the judgments of their Lordships of the Privy Council in either of the two cases to which I have just referred, from which it can be argued that the *onus* is on a defendant in a suit for redemption of proving that the suit is not brought within time.

(1) 7 Calc., L. R., 364. (2) I. L. R. 5 All., 354.  
 (3) L. R., 9 I. A., 99.

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It appears to me that their Lordships of the Privy Council in the case of *Raja Kishen Dutt Pandey v. Norendar Bahadur Singh* (1), although they were then considering Act I of 1869, enunciated, if I may say so, the correct rule of law as to the *onus* of proof in suits for redemption of mortgage applicable to cases like the present. In that case which was one for redemption of mortgage, the then Officiating Judicial Commissioner of Oudh had held that there was a presumption of law in favour of the plaintiff, and that the burden of proof lay, not upon the plaintiff to prove that the term did not expire before the 13th February, 1856, which was the material date so far as limitation in that case was concerned, but upon the defendant to prove that it did. Their Lordships at pp. 88 and 89 of the report are reported to have said, "Their Lordships are not prepared to concur with the Judicial Commissioner in the view that he expressed that the presumption of law is such as he described it. It appears to their Lordships that in such a case as the present it lies upon the plaintiff to substantiate his case by some evidence, by some *prima facie* evidence at least. But in this as in most other cases, where the *quantum* of evidence required from either party is to be considered, regard must be had to the opportunities which each party may naturally be supposed to have of giving evidence, and although the burden of proof *prima facie* in this case in their Lordship's view is upon the plaintiffs, still they think the consideration should not be omitted that the defendant would naturally have the mortgage, and that it would be *prima facie* at all events, more in his power to give accurate evidence of its contents than in that of the plaintiff," and further—"Now applying this view of the law to the present case, their Lordships have to see whether the plaintiff, in this view, did give such *prima facie* evidence as shifted the burden of proof on the defendant. Although it may be that the evidence of neither side is altogether satisfactory, nevertheless their Lordships, after giving their best consideration to the case, are of opinion that the plaintiff did give some such *prima facie* evidence. He was himself examined. He called seven or eight witnesses who deposed to the contents of the instrument, to its containing

(1) L. R., 3 I. A., 85.

the term which he contended for, and further, to the admission of the defendant or of his predecessors of the existence of some such term, and the Extra Assistant Commissioner believed the witnesses, having, as was before observed, the opportunity of seeing and observing their demeanour." It is quite plain to my mind that their Lordships held in that case that the *onus* of proving that the suit for redemption of mortgage was brought within time lay upon the plaintiff. They held that *prima facie* evidence to that effect amounted to proof sufficient to shift the burden upon the defendant of proving the contrary. It cannot be suggested that their Lordships in using the words "It lies upon the plaintiff to substantiate his case by some evidence, by some *prima facie* evidence at least" meant to suggest that evidence which is not believed or considered reliable by a Judge who has to find the facts would be sufficient to substantiate a plaintiff's case so as to shift the burden of proof from his shoulders to those of a defendant. In that case there was in addition to the evidence of the plaintiff the evidence of seven or eight witnesses "who deposed to the contents of the instrument, to its containing the term which he (the plaintiff) contended for, and further, to the admission of the defendant or of his predecessors of the existence of some such term." One piece of evidence in that case was that the defendant in certain settlement proceedings in 1857 corrected a statement that he was the purchaser of the property and described himself as a mortgagee, a statement which was *prima facie* inconsistent with the term of the mortgage having expired before the 13th February, 1856. Their Lordships in conclusion and after they had discussed at some length the evidence, such as it was, on the record say,—“ Their Lordships therefore think that the evidence of the plaintiff is to some extent corroborated by an admission of the defendant, to the effect that there was in existence a mortgage in 1857. They therefore think that the plaintiff gave some evidence calling upon the defendant for an answer. It may be that the evidence was not very strong, and that it would have been rebutted by evidence any force on the other side. But their Lordships are of opinion that the evidence of the defendant, the main portions of which appear to have been disbelieved by all three Courts,

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some documents connected with which have been treated by all three Courts as spurious, contains no answer to the case of the plaintiff which must therefore prevail."

It has been contended here that the defendant having pleaded that he held an unsatisfied mortgage of 1820, and its having been found that the mortgage of 1820 did not relate to the land or share in question, such admission was an admission that the defendant-appellant was a mortgagee as alleged by the plaintiffs, and cast upon the defendant the *onus* of proving that the mortgage alleged by the plaintiffs, namely, one of 1836 for Rs. 150 had not been made. I have failed to see any force in that contention. I cannot see how the second line of defence of the defendant which failed, namely, that he held under an unsatisfied mortgage of 1820 can be twisted into an admission or evidence of any kind that the mortgage alleged by the plaintiffs was made or that the plaintiffs are entitled to redeem on the basis of the mortgage alleged by them, the making of which was unequivocally denied and put in issue by the defendant in his written statement.

Accepting as we must in second appeal the conclusions of fact of the late Judge of Azamgarh, there was here in my opinion no *prima facie* evidence that the mortgage alleged by the plaintiff had been made in 1836 or at all, or that this suit, in which they claimed to redeem an alleged mortgage of 1836 for Rs. 150, was brought within time. It may very well be that the defendant in 1836 honestly but mistakenly believed, if he was mistaken, that the mortgage of 1820 did relate to the property in question, and it may also be that if that mortgage-deed did not relate to the property in suit he was unaware of what the origin of his title was. It is not suggested that the defendant was an original party to the mortgage of 1820 or to the alleged mortgage of 1836. I cannot understand upon what principle a defendant could be expected to produce or give evidence of the contents of an alleged mortgage-deed or other document, of the making or existence of which there was no *prima facie* evidence, particularly when the making and existence of the alleged document were in issue in the case and denied by the defendant, and when

the alleged document was not set up by him as the origin of his title.

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In *Nura Bibi v. Jagat Narain* (1) my brother Straight and Tyrrell put the same construction upon the judgment of their Lordships of the Privy Council in *Kishen Dutt Pandey v. Narendar Bahadur Singh* (2) which I do. The case before my brothers Straight and Tyrrell was one of redemption of mortgage. At page 300 of the report they are reported to have said:—"The only remaining question is as to whether the learned Judge rightly held the burden of proof to be on the plaintiff. The defendant is admittedly in possession, and, in our opinion, though the existence of a mortgage as the origin of such possession was conceded by him, it lay upon the plaintiff to give *prima facie* proof of the subsistence of his mortgage at the date of suit."

In *Balaji Narji v. Babu Deoli* (3) the Bombay High Court held in a redemption suit that the admission by the defendant that the plaintiff's ancestor had had proprietary possession of the land in suit, and the failure of the defendant to prove his plea that he held by purchase, did not relieve the plaintiff of the *onus* of giving *prima facie* evidence that the mortgage alleged by him had been made. To the same effect is the judgment of this Court in *Ratan Kuar v. Jiwan Singh* (4).

The case of *Radha Prasad Singh v. Bhajan Rai* (5) does not, I think, bear upon the present case. In the case of *Bhagwan Singh v. Mahabir Singh* (6) which was a suit for pre-emption, my brothers Brodhurst and Mahmood applied the rule as to the *onus probandi* enunciated in *Kishen Dutt Pandey v. Narendar Bahadur Singh* (2) apparently with approval, to the case before them, and I think correctly.

In S. A. No. 289 of 1886, I held, my brother Brodhurst concurring with me, that the plaintiff who claimed as a mortgagor must prove his mortgage. I need hardly say that *prima facie* evidence

(1) I. L. R., 8 All. 295.

(2) I. R., 3 I. A., 85.

(3) 5 Bom. H. C. R., A. C. 1.

(4) I. L. R., 1 All., 194.

(5) I. L. R., 7 All., 677.

(6) I. L. R., 5 All., 184.



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It appears to me that that view of the law was in accordance with the authorities.

In conclusion I shall quote a passage from a judgment of Mr. Justice West in *Ram Chandra Apaji v. Balaji Bhaurav* (1) which in my opinion is not only consistent with common sense, but so far as it deals with the law, is a correct exposition of the law on this point. The passage which I quote is to be found at p. 140 of the report and is as follows:—"We are thus left to the facts that Ram Chandra (the defendant in a suit for redemption of an alleged mortgage) has been in possession since 1854-55, apparently as owner, that he says he is owner, and that the plaintiff, on the contrary, says he is but a mortgagee, and has admitted that he is so. According to s. 110 of the Evidence Act, possession is *prima facie* evidence of a complete title; any one who would oust the possessor must establish a right to do so: and possession unexplained, held for twelve years, would, according to *Sambhubhai Kareandas v. Shivaldas Sadashivdas Desai* (2), constitute a complete title not qualified by an assertion of the holder that he purchased from this or that person. The assertion of ownership at all implies some lawful acquisition of the title, and the effect of possession as owner cannot be impaired by the surplus statement that the holder acquired by the mode of acquisition most serviceable for a holder for a short period. Here the defendant, Ram Chandra, had held undoubtedly for about thirty years, and in such a case any one who after the lapse of so long a time comes forward seeking to make him a mere mortgagee must, according to *Sevaji Vijaya Raghunadha Vaoji Kristnan Gopalar v. Chinna Nayana Chetti* (3) prove his own right as mortgagor clearly and indefeasibly. Such statements as have been made in this case fall far short of satisfying this test. They fail to establish any particular mortgage at all, and are not of such a kind that, showing a definable or distinguishable mortgage to have been executed, they throw on

(1) 1. L. R., 9 Bom., 137.

(2) 1. L. R., 4 Bom., 89.

(3) 10 Moo. I. A. 160.

the mortgagee the *onus* of proving what the terms of it were, and his right under it to retain the property until he is paid off. No doubt a mortgagor, who has no document of acknowledgment from a mortgagee, may suffer from the difficulty of proving his title of fifty years ago ; but, on the other hand, the owner of property is not to be deprived of it on mere vague intangible statements about a mortgage for which no one could be effectively brought to book in the event of their being proved false. In such cases the law leans in favour of possession and an apparent right exercised for many years. It requires the person who comes in to redeem on his own terms to make out a clear case, to succeed by the strength of the title he sets up."

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In my opinion the authorities and the law as it exists and has existed are on the side of the defendant-appellant, and I would not have gone at this length into the authorities had it not been for the expression of opinion and doubts which my brother Mahmood threw out during the course of the arguments.

In my opinion the appeal should be allowed with costs, and the suit dismissed with costs in the Courts below.

BRODHURST, J.—I concur.

MAHMOOD, J.—I am also of the same opinion as the learned Chief Justice, and I agree with him in all that has fallen from him. But because I was one of the Judges who referred this case to a Bench consisting of more than two Judges, I wish to say that at the hearing of the case and throughout the argument, I did entertain considerable doubts as to what in a case such as this should be the rule of *onus probandi* upon which the case would turn. I confess now that after having had the advantage of hearing the judgment which the learned Chief Justice has just delivered, I no longer entertain any doubts to the requirements of the law and the rule which should be the rule of decision in cases such as these. It seemed to me of course at first sight that in a case where the property is sought to be redeemed by a mortgagor, and any particular mortgage is admitted by the defendant, the possession of the defendant upon his own admission must be taken to be a possession other

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 PARMANAND      trustee or not, it could not, as I then thought, be regarded as  
 MISE      adverse to the plaintiff. These are the reasons why I doubted  
 v.      whether after an admission of mortgage it did not rest upon the  
 SAHIB ALL.      defendant to show that the title which the plaintiff had asserted,  
                  namely, of having at some time been the owner of the property had  
                  or had not been defeated by lapse of the period of limitation.

I have mentioned all this to indicate how doubts did arise in my mind. But the judgment of the learned Chief Justice deals with the whole of those difficulties, and I do not wish to add anything to it beyond just indicating the manner in which my own mind is satisfied that I must adopt and agree in that judgment.

In the courts of justice in England, if I remember the English law rightly, the plea of limitation is a plea which falls under the class of matters *ad litis ordinationem* and does not go to the essence of the right, that is to say, matters *ad litis decisionem*.

Indeed, in England, if I understand the English law rightly, it rests upon the defendant to waive his plea of limitation, much in the same manner as a defendant in an action *ex contractu* would be entitled to waive a plea of minority. In India, however, the Legislature has interfered, and by the imperative terms of s. 4 of the Limitation Act, it has declared that every suit which falls beyond the limit of the period of limitation provided by the statute, Act XV of 1877, shall be dismissed whether the plea be waived or not.

Here then the plea raised by the defendant was a plea under that statute, that is to say, under article 148. That article relates to cases such as this, namely, cases against mortgagees to redeem, and the clause provides that sixty years is the period of limitation, and that such period is to be calculated from the time when the right to redeem accrues.

The learned Chief Justice has pointed out why under conditions such as these the question whether the period of limitation has expired or not becomes under our law not merely a matter of plea

but a matter which goes to the root of the title of the plaintiff. His Lordship has pointed out in respect of the provisions of s. 110 of the Evidence Act, that the law presumes that when a person in long possession of property is required to move out of the property by one who alleges a mortgage for the object of extending the period of limitation, the ordinary presumption that ownership is to be presumed from possession does not vanish. I have no doubt that should be the law, and it is so as I interpret s. 110 of the Evidence Act.

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I must also add in reference to what the learned Chief Justice has said, that in this connection my own mind has been materially assisted by what he said as to the effect of s. 28 of the Limitation Act which lays down a rule of substantive law. It declares that after the lapse of the period provided by that enactment the right itself is gone; it is not the remedy that is gone, but the title itself ceases to exist.

These considerations leave the matter in no doubt now. Therefore in a case such as this where the plaintiff came upon the allegation that the possession of the defendant was that of a mortgagee under a mortgage of 1836, and the defendant says that his mortgage was of 1820, it lay upon the plaintiff to prove that at the date of the filing of the suit he had a subsisting mortgage or at that date he had any title to the ownership of the property.

In reference to this matter I wish to refer to a ruling of this Court in *Sheo Ruttun Gir v. Doorga* (1) which supports the conclusions at which the learned Chief Justice has arrived. I may say that I feel indebted to the learned Chief Justice for having taken the trouble to prepare the elaborate and exhaustive judgment which he has done on account of the doubt which had arisen in my mind over the question of the burden of proof. I am happy to say that after having considered the matter I entirely agree in the order which he has made.

*Appeal allowed.*

(1) N.-W. P. H. C. Rep., 1874, p. 36.

*Before Mr. Justice Straight and Mr. Justice Brodhurst.*

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March 21.

HASAN ALI AND ANOTHER (PLAINTIFFS) v. NAZO AND ANOTHER  
(DEFENDANTS). \*

*Limitation—Muhammadan Law—Inheritance—Gift—Suit by heir for share of donor's property by declaration of invalidity of gift—Act XV of 1877 (Limitation Act), sch. ii, Nos. 91, 144.*

A Muhammadan who in October, 1875, executed a deed of gift of his property, under which possession was taken by the donees, died in June, 1885, never having taken any steps to have the deed of gift set aside. In February, 1886, a suit was brought by his nephew, claiming a share in the donor's estate by right of inheritance, and by having it declared that the deed was procured from the donor by fraud and undue influence. It was found that the plaintiff was aware of the existence of the deed soon after its execution, and that if there were any facts entitling him to have it cancelled, those facts were known to him more than three years before the institution of the suit.

*Held* that the plaintiff had, during the donor's lifetime, no reversionary or vested interest in the estate, but a mere possibility of inheritance, and consequently the donor, when he executed the deed, had full disposing power over his property, and the right which, at his death, accrued to the plaintiff, came to the latter affected by the donor's acts and dispositions; and that as a suit by the donor to set aside the deed would, at the time of his death, be barred by art. 91 of the Limitation Act (XV of 1877), such a suit was also barred against the plaintiff who claimed through him, the cancelment of the deed being a substantial and necessary incident of the claim, and the necessity which rested upon the plaintiff for obtaining such cancelment before he could dislodge the donees not being obviated by his choosing to call the suit one for possession of immoveable property. *Abdul Wahid Khan v. Nurun Bibi* (1) and *Jagadamba Chowdhram v. Dakhina Mohun* (2) referred to.

The facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Abdul Majid*, for the appellants.

Mr. *Hameed-ullah* and the Hon. *Pandit Ajudhia Nath*, for the respondents.

STRAIGHT, J.—The following are the facts necessary to be stated in order to make the grounds upon which this second appeal will be disposed of intelligible.

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\* Second Appeal No. 1335 of 1887 from a decree of Munshi Manmohan Lal, Subordinate Judge of Azamgarh, dated the 1st June, 1887, confirming a decree of Maulvi Muhammad Amir-ud-din, Munsif of Muhammadabad, dated the 9th August, 1886.

(1) L. B., 12 I A., 91.

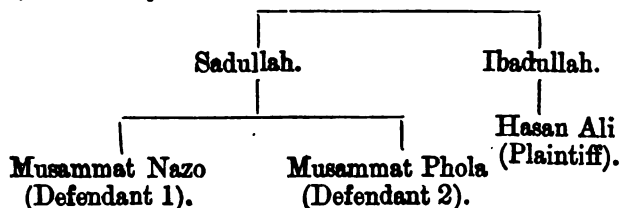
(2) L. R., 13 I. A., 84.

There were two brothers from whom the parties to the present suit come, as the subjoined tree shows :—

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The plaintiff Sadruddin is a transferee from Hasan Ali under a deed of sale of the 29th September, 1885. On the 13th October, 1875, Sadullah made a gift of the property now in suit to his two daughters, the defendants, and on the 10th June, 1885, he died. The present suit was instituted on the 15th February, 1886, for a declaration of the plaintiff Hasan Ali's right by inheritance under the Muhammadan Law to one *seham* out of the three *sehams* into which the estate of Sadullah was divisible on his death, by declaring the deed of gift of the 13th October, 1875, ineffectual on the ground that it was obtained from Sadullah by the defendants "when he was very old and out of his senses." The first Court dismissed the plaintiffs' suit, holding them to have failed to establish their case upon all points. The lower appellate Court, though apparently finding that the deed of gift was perfected by possession given and taken thereunder, has upheld that decision upon the ground that the suit, being one for the invalidation of the deed of gift, is barred by art. 91 of the Limitation Act. The decree of the learned Subordinate Judge is assailed in second appeal upon this contention, that the suit being really one for the recovery of possession of immoveable property by declaration of the right of inheritance thereto of the plaintiff Hasan Ali, is governed by the twelve years' rule. I have very fully and carefully considered the arguments addressed to us at the hearing of the appeal, and in the result the matter appears to me to present itself thus. It is not denied that the property now in suit belonged to Sadullah Khan, and that so long as he lived it was competent for him to dispose of it by way of gift; in other words, he was the full and absolute owner and, as such, entitled to deal with it in that way. It is equally

1889 . . clear that had he been induced by fraud, misrepresentation, undue  
 HASAN ALI influence or coercion to execute a deed of gift, he could have come  
 v. into Court to avoid it upon that ground. But he did not do so,  
 NAZO. and, as far as I understand the Muhammadan Law, his gift of his  
 property to his two daughters was as effectual and binding against  
 him from the time it was made, as if he had sold the property  
 covered by it to a stranger vendee for good consideration. Then  
 the question arises, could the plaintiff, Hasan Ali, have come into  
 Court in the lifetime of Sadullah, his uncle, and asked for a declar-  
 ation that the deed of gift was invalid upon the ground now  
 asserted by him? I am clearly of opinion that he could not, and  
 I think such a suit would have been open to that objection *in*  
*limine*, that his expectant right as a possible heir of his uncle, should  
 he survive him, was, to use the words of my brother Mahmood in  
 a judgment of his as Judge of Rae Bareilly, approved by the Lords  
 of the Privy Council in *Abdul Wahid Khan v. Nuran Bibee* (1)—“a  
 mere possibility which, under the Mahammadan Law, is not regarded  
 as a present or vested interest.” In other words, if I understand  
 the Muhammadan Law aright, it does not recognise any rever-  
 sionary inheritance or contingent interest expectant on the death of  
 another, and till that death occurs which by force of that law gives  
 birth to the right as heir in the person entitled to it according to  
 the rule of succession, he possesses no right at all. Consequently  
 until his uncle Sadullah died, Hasan Ali had no right present or  
 expectant, which, had he predeceased Sadullah, would, supposing  
 him (Hasan Ali) to have had a son, have passed to such son. It  
 seems to my mind therefore to follow that Sadullah having full  
 disposing power over his property to the date of his death, and  
 such death being the crucial point, the right which then accrued to  
 Hasan Ali came to him through Sadullah subject to and affected  
 by any act done or disposition made by Sadullah in the exercise  
 of his undoubted rights as proprietor. No doubt had a will been  
 then put forward by the defendants to justify their possession of  
 the whole estate by way of bequest from Sadullah, he could have  
 withheld his consent to it with the results provided by the  
 Muhamadan Law, because he had then acquired his right as

(1) L. R., 12 I. A., 91.

heir. But it is to be observed that the principle underlying this rule is that it is only on the death of the testator that the right of the heir to assent or refuse assent to the bequests of a will comes into existence, and no assent given in the lifetime of the testator has any force or binding affect. But in the present case we have not to deal with a will, but a deed of gift made by the proprietor of an estate nearly ten years before his death and neither revoked nor sought to be set aside by him. If Sadullah were alive now, and had come into Court with a suit to set aside his deed of gift, it cannot be denied that he would have been barred by the limitation of art. 91 of the Limitation Act. How then is the position of the plaintiff, Hasan Ali, better than that of the person through whom he claims? As I have before remarked, had Sadullah sold the property in suit to a purchaser for good consideration, such sale could not be impeached by Hasan Ali; for it was fully within his uncle's powers, and the title the vendee acquired against Sadullah would hold good as against him. The deed of gift of October, 1875, in my opinion, does not stand upon an inferior footing, and as it was binding on Sadullah, so it is binding on the plaintiff, Hasan Ali. But it is said, this being a suit for the recovery of immoveable property by right of inheritance, the prayer for invalidation of the deed of gift is merely ancillary and incidental to the main purpose of the suit and cannot affect the substantive relief sought. And the same contention was raised in *Jagadamba Chaudhrain v. Dakhina Mohun* (1) with regard to art. 129 of Act IX of 1871, which was a suit by reversionary heirs for possession of immoveable property in which the validity of the adoption of the defendants in possession came into question. Their Lordships held that in suits governed by that Limitation Act, where the plaintiff cannot succeed without displacing an apparent adoption under which defendants are in possession, must be brought within twelve years from the date of the adoption or (at the option of the plaintiff) the date of the death of the adoptive father. In the present case it seems equally clear to me that the plaintiffs cannot dislodge

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the defendants from the property, of which they are admittedly in possession without clearing out of their way the deed of gift of October, 1875, and that merely because they choose to call the suit one for possession of immovable property, they cannot escape the obligation to do so. If then this be the true view of the matter, and the prayer to set aside the deed of gift is to be regarded as a substantial incident of their claim, what is the article of the limitation law applicable to such a suit? It is not denied that almost from the date of the deed of gift Hasan Ali was aware of its existence, and that had he possessed any right to maintain a suit for its cancelment, "the facts entitling him to have it cancelled or set aside" were known to him much more than three years before the present suit was instituted, and he is now barred. But as I have already ruled, he had no such right, and the grounds upon which he seeks relief from the deed are grounds which can only come to the plaintiff, Hasan Ali, through Sadullah. As time had run against Sadullah, so, in my opinion, it has run as against the plaintiffs, and the Subordinate Judge rightly held them barred by art. 91.

The appeal is dismissed with costs.

BRODHURST, J.—I concur.

*Appeal dismissed.*

P. C.  
J. C.  
May 17th,  
21st and  
23rd, July  
6th.

## PRIVY COUNCIL.

MUHAMMAD MUMTAZ AHMAD AND OTHERS (PLAINTIFFS) v.  
ZUBAIDA JAN AND OTHERS (DEFENDANTS).

[On appeal from the High Court for the North-Western Provinces.]

*Claim to possession of property under deed of sale—Consideration—Muham-  
madan law—"Mushaa"—Effect of possession following upon gift to  
render it valid.*

The law relating to the invalidity of gifts of "mushaa," i.e., the prohibition of the gift of an undivided part in property capable of partition, ought to be confined within the strictest rules; and the authorities on the Muham-  
madan law show that possession taken under a gift, even although that gift might with reference to "mushaa" be invalid without it, transfers effectively the property given, according to the doctrines of both the Shia and Sunni schools. Possession once taken under a gift is not invalidated, as regards

Present: LORD WATSON, Sir B. PEACOCK and Sir R. COUCH.

its effect in supporting the gift, by any subsequent change of possession.

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The subject of the gift was shares in revenue-paying villages, with land, houses and moveables. Of the greater portion of this property, the donor, a mother giving them to her daughter, had only so far possession that she was in receipt of the rents and profits. In the deed of gift she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she had made the donee, her daughter, possessor of all the properties; and she directed that the gift should be carried into effect by the daughter's husband, who was manager of estates on behalf of both mother and daughter before then.

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*Held*, in a suit for the possession of the property on a sale by the heir of the donor, brought by the vendees against him, and joining as defendants the heirs of the daughter, then deceased, that sufficient possession had been taken on behalf of the daughter to render the gift effectual, and to defeat the claim as against her heirs.

APPEAL from a decree (22nd June, 1885), of the High Court, reversing a decree (1st May, 1884) of the Subordinate Judge of Mainpuri, and dismissing the appellant's suit.

The first of the two questions in the suit out of which this appeal arose was as to the payment of the consideration upon a deed of sale, dated 16th, December, 1882, in favour of the plaintiffs, who claimed possession upon it. The other, forming the second issue, related to the validity of a deed of gift, purporting to have been executed on 12th February, 1879, by a Muhammadan widow in favour of her daughter, now represented by the first six defendants, this gift disposing of the property the subject of the sale; and, if valid, effectually preventing any such subsequent transfer by the vendor, who made title as heir to the widow. By this sale deed, which was registered, the vendor, Muhammad Usman, in consideration of Rs. 10,000, purported to transfer to two of the plaintiffs, and to another person, (through whom a third plaintiff claimed,) three-fourths of his interest in the property left by his sister, Himayat Fatma, who died in January, 1882, he being her sole heir. The property was described as in greater part "zamindari villages together with all the appurtenances, perpetual maafi lands, and resumed maafi, milkiats and groves situate in pargana Mahrera, the estate of Himayat Fatma Begum." The execution of this was

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admitted by Usman, who stated in his defence that when he was before the sub-registrar he received Rs. 2,500; and acknowledged the previous receipt of Rs. 2,500; and his case was that, notwithstanding such acknowledgment, he had not, in fact, received the latter sum; having also handed back the Rs. 2,500 after the registration.

The plaint also stated that the six other defendants, who were the heirs of the deceased daughter, Zahur, prevented the plaintiffs from getting possession, falsely setting up a deed of gift from Himayat to Zahur. These defendants, however, in their written statement maintained that the deed of gift was valid, and that under it Zahur had received possession of all the property claimed in the present suit. They further alleged that the plaintiffs' deed of sale had been obtained from Usman by collusion to deprive them of their rights, and without *bona fide* payment.

The Subordinate Judge found that the Rs. 7,500 were not paid, and that it was not proved that Usman returned the Rs. 2,500 which he received before the sub-registrar. As to the deed of gift, he disbelieved the evidence as to its execution, and held that, even if executed, it would have been invalid on the ground of "mushaa." He found that no possession had been delivered under this gift. Proportioning the property comprised in the sale to the part of the consideration which he found to have been paid, he decreed in favour of the plaintiffs for possession of one-fourth.

The plaintiffs appealed to the High Court for the whole claim to be allowed, on the grounds, first, that the whole consideration had been in fact paid; and, secondly, that, even on the view of part payment only having been made, they were entitled to completion of the sale of the whole property by possession being given to them. The six defendants preferred a cross appeal, to the effect that their property was being conveyed away collusively, inasmuch as the deed of gift of 12th February, 1879, was valid, and had been followed by possession. They alleged that the payment of the Rs. 2,500 by the plaintiffs had not been proved, nor, in fact, made. But their case was that they were entitled by the gift prior in date,

which had been followed by delivery, and with which the doctrine of "mushaa," erroneously applied by the Subordinate Judge, had nothing to do.

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The plaintiffs' appeal was dismissed by the High Court, (PETHERAM, C. J., and TYRRELL, J.). They refused to interfere with the conclusion of the Subordinate Judge.

The cross appeal of the six defendants was, however, decreed, and the suit was dismissed altogether, for reasons thus expressed in the judgment:—

"The plaint states that the plaintiffs bought this property by a deed and paid Rs. 10,000 consideration. This is denied by the principal defendant, and upon this issue the case went to trial. It was the foundation of the whole case, and the Subordinate Judge decided that the deed was executed and the consideration was not paid. The plaintiffs' allegation was that they paid the entire consideration for the entire property, and their main proposition having failed, the Judge ought to have dismissed the suit as brought. But instead of doing this, he divided an indivisible, consideration and an indivisible property, and said that, because the plaintiffs had paid a part of the consideration, they were entitled to a part of the property. This was making a new contract for the parties, which the Subordinate Judge had no power to do. We decide the case upon this ground only and we decide nothing as to the merits. The appeal must be allowed on the ground that the first Court has granted a relief which is not in accordance with the plaintiffs' claim, and that the plaintiffs have failed to prove the main allegation upon which their prayer for relief was based. We make no order as to costs in this case. In first Appeal, No. 93 of 1884, the appeal is dismissed with costs."

Mr. J. Graham, Q. C., and Mr. R. V. Doyne, for the appellants, argued that the decrees of the High Court should be reversed and that the whole claim of the plaintiffs should be decreed; or that they should receive such proportionate relief as had been decreed to them by the first Court.

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It was submitted that in regard to the Indian Registration Act, III of 1877, ss. 58 and 59, an admission of payment endorsed in accordance with s. 58, such as had been made in this case, was *prima facie* evidence against the executant; and, without evidence to the contrary, conclusive. This, and other facts, threw the burden of disproving payment on to Usman and the other defendants, who had not sustained it. On the other hand, it was sufficient to entitle the plaintiffs to a decree if the evidence, as to which the High Court had given its own opinion, should show that the Rs. 2,500 had been paid. The sale was complete under s. 54 of Act IV of 1882, whether the money was actually paid or not, if the agreement was for future payment. It was the right to the possession that was now in question, and the contention was that the transfer of a right of possession of the property would be none the less a transfer because the transferring vendor happened to be out of possession. They referred to Macnaghten's Principles of Muhammadan Law, Chap. III, Sale, paras. 12 and 18, Precedents of Sale, Case IV.

Mr. J. H. A. Branson, for the six respondents claiming under the gift to Zahur, contended that the dismissal of the suit was right, if not precisely on the grounds stated in the judgment of the High Court.

The concurrent findings of the courts below were that the Rs. 7,500 were not paid, and even if the Rs. 2,500, contrary to the weight of the evidence, were to be taken as paid, the plaintiffs had failed to show themselves entitled to possession. Instead of performing, or being ready and willing to perform, their part of the contract, the plaintiffs were found alleging that they had made a greater payment than they had made, if not alleging a payment when they had made none.

He referred to *Kabe Pershad Tewari v. Raja Sahib Perhlad Sein* (1), *Rani Bhobosunderi Dassia v. Issarchunder Dutt* (2), *Kali Das Mullick v. Kanhaya Lal Pandit* (3).

(1) Reported with, and as part of, the case of *Raja Sahib Pershad Sein v. Babu Budhoo Singh*, 12 M. I. A., 306, at p. 311; also 2 B. L. R., P. C., 111. (2) 18 W. R., 140. (3) L. R., 11. I. A., 218; I. L. R., 11 Calc. 121.

There was another, and it was submitted a complete, ground for the dismissal of the suit, as against the six defendants, *viz.*, that at the death of Himayat the estate which Usman purported to sell had been already transferred to others. The deed of gift of 12th February, 1879, was valid, all the reasons assigned by the Subordinate Judge, for its being invalid and inoperative, being inadequate. It was an error in the judgment of the first Court to assert that possession had not followed that deed of gift. He referred to the proceedings taken to obtain mutation of names, and the other evidence on the question of possession by Zahur; and argued that in the case of a gift from a parent to a child, proof of the transfer of the possession was not required to establish it. He referred to *Musammat Ameer-un-nissa Khatoon v. Musammat Abed-un-nissa Khatoon* (1), in which case it was said that the general principle of Mahammadan law, that a gift is invalid where there is a want of

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(1) 23 W. R. (P. C., Civ. Rul.) 208. As to "mushaa" the following is part of the judgment in the cases cited:—"A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of mushaa, or an undivided part in property capable of partition, was by Muhammadan law invalid. That a rule of this kind does exist in Muhammadan law, with regard to some subjects of gift, is plain. The Hedaya gives the two reasons on which it is founded: first, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor he had not engaged for, *viz.*, to make a division (see Book XXX, c. I, Vol. 3, p. 293). Instances are given by text writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow.

"In the present case the subjects of the gifts are definite shares in certain zamindaris, the nature of the right in them being defined and regulated by the public acts

of the British Government. The High Court, after stating that 'the shares were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue,' and further, that the proprietor collected a definite share of the rents from the ryots and had a right to this definite share and no more, held that the rule of the Muhammadan law did not apply to property of this description.

"In their Lordships' opinion this view of the High Court is correct. The principle of the rule, and the reasons on which it is founded, do not, in their judgment, apply to property of the peculiar description of these definite shares in zamindaris, which are in their nature separate estates, with separate and defined rents. It was insisted by Mr. *Leitch* that the land itself being undivided and the owners of the shares entitled to require partition of it, the property remained 'mushaa.' But although this right may exist, the shares in zamindaris appear to their Lordships to be, from the special legislation relating to them, in themselves, and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to mushaa.

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acceptance and seisin by the donee, is subject to the exception that where there is on the part of a father or other guardian a *bonâ fide* intention to make a gift, the law will be satisfied without change of possession. Here, however, the evidence showed that Zahur had, through her manager, her husband, Ahmad Husain, obtained possession. That being so, the gift to her, which she lived long enough to receive as a valid gift, was effective; and rendered Usman's subsequent deed of sale inoperative.

Mr. J. Graham, Q. C., replied, contending that the deed of gift of 1879 had not been completed by delivery of possession to Zahur.

On a subsequent day, 6th July, their Lordships' judgment was delivered by SIR B. PEACOCK.

SIR BARNES PEACOCK.—The appellants, who were plaintiffs in the suit, claim as purchasers of three-fourths of a share in an estate to which they alleged that Muhammad Usman had succeeded by descent from Himayat Fatma. The first two appellants claimed as direct purchasers from Usman, and the third as a sub-purchaser.

The estate originally belonged to Chaudhri Hafiz Husain, who died in 1865 without leaving male issue. After his death his widow, Himayat Fatma, and his daughter, Zahur Fatma, by an award made with their mutual consent, obtained proprietary possession of the property in equal shares, and Chaudhri Ahmad Husain, husband of Zahur Fatma, was entrusted with the management.

The plaintiffs in their plaint (para. 4) alleged that upon the death of Himayat Fatma in the beginning of 1882, Muhammad Usman became her heir, and that according to the distribution of shares under the Muhammadan law Usman got 229 out of 390 sihams, and the heirs of Zahur, who died in December, 1879, in her mother's lifetime, got 161 sihams; that out of his right Usman sold three-fourths, amounting to 171½ sihams, to the plaintiffs, Mumtaz Ahmad and Firasat Husain and Sahib Ali Khan, for Rs. 10,000 on the 16th December, 1882, and received the consideration money and got the deed registered; and that on the 3rd May, 1883, Sahib Ali Khan sold his interest to the appellant, Sheik Irshad Husain, under a sale

deed. They charged that the daughters, the grandson, and the son-in-law of Ahmad Husain had entered into a collusion with Usman, and interfered with their possession, and prayed that they might be put into possession of the claimed property, being 171½ out of 390 sihams of the property detailed in the plaint, by proving the sale deeds of the 16th December, 1882, and 3rd May, 1883, and setting aside the proceedings of the Revenue Court. They alleged that their cause of action accrued on the 4th January, 1882, the date of the death of Himayat Fatma, and they valued their claim at Rs. 10,000, the amount of consideration.

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Usman was made a *pro forma* defendant.

The case of the first six defendants-respondents was that the sale deed by Usman had been obtained by fraud without the payment or receipt of the consideration money only for the purpose of carrying on litigation, and further that Usman had no right to the property inasmuch as Himayat Fatma had executed a deed of gift of her share to her daughter, Zahur Fatma, under which the latter had obtained possession.

Usman in his written statement said : "The plaintiffs obtained the sale-deed from the defendant by fraud. They got him to acknowledge before the sub-registrar the receipt of Rs. 7,500 without paying the same to him, and the Rs. 2,500 which they had paid to him was taken back by them after registration on the pretence that they would use it in meeting the costs of suit," and in paragraph 5 he stated that "Sahib Ali Khan, who is brother of defendant's wife, has, for fear of losing the good opinion of the brotherhood, sold his share for Rs. 100 to Irshad Husain."

The important issues of fact were—

- 1st.—Was the consideration for the sale by Usman paid, and was the sum of Rs. 2,500 paid at the time of registration taken back or not?
- 2nd.—Did the deed of gift in favour of Zahur Fatma become null and void, and was possession held in accordance therewith?



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4th.—Did Usman inherit the estate of Himayat Fatma, or had she no right left to her at the time, of her death?

The Subordinate Judge of Mainpuri, before whom the case was tried in the first instance, found upon the first issue that the Rs. 7,500 were not paid, but that the Rs. 2,500 paid at the time of registration were not taken back. Upon the second issue, he found that the deed of gift in favour of Zahur Fatma was a fictitious document and was null and void. He said in the first place the gift was made in respect of an undivided property. The detail of the properties given at the foot of the plaint shows that some of them are joint. Such a gift is invalid under the Muhammadan law. Secondly, according to Muhammadan law the delivery of actual possession is necessary. But in the present case the donor was in possession of all the properties, and the donee died before she could obtain possession of them. He then gave his reasons for considering that Himayat Fatma continued in possession.

The result was that the Subordinate Judge, considering that only one-fourth part of the alleged consideration for the sale by Usman had been paid, gave a decree for the plaintiffs for one-fourth of the property claimed in the plaint.

From that decision the plaintiffs appealed to the High Court, for, amongst others, the following reasons:—

1st.—Because the finding of the lower Court that Rs. 7,500 out of the consideration was not paid by the plaintiffs was against the weight of the evidence.

4th.—Because it being shown that the deed of sale was delivered to the plaintiffs, and that a portion of the consideration had been paid by the appellants, the whole claim ought to have been decreed.

The first six defendants appealed to the High Court, for, amongst others, the following reasons:—

1st.—Because the lower Court has erred in holding that the deed of gift, dated the 12th February, 1879, was

not valid under the Muhammadan law, by reason of "mushaa." 1889

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*2nd.*—Because the Subordinate Judge's finding, that the gift in question was not followed by delivery of possession in favour of the donee, is against the weight of vidence, which proves that the gift was duly carried out on behalf of the donor while the donee was alive, and that the gift took full effect with the consent and free will of Himayat Fatma, the donor.

*3rd.*—Because it is established by sufficient evidence that the donor, on the demise of the donee, in confirmation of the gift, caused Ahmad Husain, the husband of the donee, to be placed in possession of the whole of the property previously conveyed by gift to Musammat Zahur Fatma, the deceased donee.

*4th.*—Because the finding of the lower Court against the validity of mutation of names, subsequently effected in favour of the husband of the deceased donee, is not correct; while the remarks made by the Subordinate Judge, as to the absence of the formalities of a proper transfer, are not well founded.

*6th.*—Because the payment of Rs. 2,500, being a portion of the consideration money of the sale-deed set up by the respondents, is not proved by the evidence on the record, and the finding of the Court below to the contrary is not correct.

Upon the appeal of the plaintiffs, the High Court held that the plaintiffs' statement that the Rs. 7,500 were paid to Usman was false, and that the defendants' statement that the Rs. 2,500 were returned was also false. They gave their reasons for disbelieving the payment of the Rs. 7,500, but they did not examine the evidence as to the return of the Rs. 2,500, notwithstanding the defendants' sixth ground of appeal, in which they said that the payment of the Rs. 2,500 was not proved by the evidence on the record; nor did they give any reason for the conclusion at which they arrived that

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the defendants' statement as to the return of that amount was false. Even as to the non-payment of the Rs. 7,500, they very much modify their opinion in a subsequent part of the judgment of the Chief Justice, wherein he says: "It appears to me that we cannot in this Court say that the Subordinate Judge who tried the question of fact decided it wrongly. It is not necessary for us to say whether, supposing the case to have come before us in the first instance, we should have arrived at the same conclusion; it is sufficient to say that we do not feel called upon to interfere with the decision he has passed." Mr. Justice Tyrrell concurred with the Chief Justice, and the appeal was dismissed with costs. Here then was a decision which, unless reversed by her Majesty in Council, would be conclusive in any future proceeding between the parties to the suit, including Usman and the purchasers, as to the non-payment of the Rs. 7,500 and the non-return of the Rs. 2,500. Their Lordships are now called upon to reverse the decision, and they are obliged to deal with the question, at least as to the non-return of the Rs. 2,500, without having the benefit of the reasons of the High Court with reference to it. This is unsatisfactory and at variance with the rule of Her Majesty in Council, which requires the reasons of the Judges to be transmitted to the Judicial Committee.

The judgment of the High Court upon the appeal by the first six defendants is still more unsatisfactory. The second issue was the most important one as regards them, for the denial of the validity of the deed of gift of the 12th February, 1879, from Himayat to her daughter, and of possession being taken in accordance therewith, went to the very root of their title. That issue was found against them as regards both law and fact by the Subordinate Judge. Their first four grounds of appeal to the High Court were directed to the findings of the first Court upon the second issue, and they were fairly entitled to an expression of the High Court's opinion with reference to those four grounds of appeal. Yet the High Court in their judgment upon that appeal have left the findings of the first Court upon the second issue wholly unnoticed, and without awarding to the defendants the costs of their appeal, have

dismissed the suit upon a mere subsidiary point not taken by the defendants in their grounds of appeal, *viz.*, the plaintiffs' failure to establish their right to stand in the place of Usman by reason of the non-payment of the Rs. 7,500. To use the words of the Chief Justice, the High Court decided the case upon that ground only and decided nothing as to the merits, notwithstanding the opinion expressed by the Chief Justice, that future litigation is likely to arise between the parties, a misfortune much more likely to be promoted than averted by abstaining from deciding the case upon the merits. Their Lordships therefore consider it to be their duty to determine the issue as to the defendants' title, as well as upon that which raises the subsidiary point as to the plaintiffs' right to stand in the place of Usman. They see no reason for the fear entertained by the Chief Justice, that if the High Court had decided the case upon the merits, and given judgment upon all the points raised by the grounds of appeal, complications could have ensued which would make it uncertain what their decision was, and create difficulties in connection with the point of *res judicata*.

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Their Lordships will now proceed to express their opinion upon the four principal issues raised in the case.

First, as to the non-payment of the Rs. 7,500, they concur entirely with the Subordinate Judge. It is very improbable that the purchasers would have paid Rs. 7,500 to Usman without taking any receipt or acknowledgment from him beyond the mere statement in the sale deed that the Rs. 10,000 had been paid, especially as the deed itself would not have been admissible in evidence of the fact before registration. The evidence of the witnesses who were called to prove that the money was at the place named and there counted and paid to Usman was contradictory and very unsatisfactory. Even admitting that Rs. 7,500 were carried to the place named by the witnesses and there counted and ostensibly made over to Usman, a story which their Lordships do not believe, there is no reliable evidence as to where or from whom the money was collected, whence it was brought, or whither and by

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whom it was carried away after the alleged payment of it to Usman. Whatever weight the admission made by Usman before the Sub-Registrar as to the receipt of the Rs. 7,500 might have had against himself, it was of no weight as against the other defendants. Neither of the plaintiffs ventured to give evidence, nor did Usman appear as a witness. It might have been some corroboration of the fact of the purchase by the plaintiffs for Rs. 10,000 if it had been proved that Rs. 4,000 were *bond fide* paid by the plaintiff, Irshad Husain, to Sahib Ali Khan for the one-fourth share of the property which the latter had purchased from Usman. But there was nothing of the sort. No proof was given of any payment made by Irshad Husain except the payment of Rs. 100 in the presence of the Sub-Registrar, notwithstanding the written statement made by Usman that only Rs. 100 were paid. The admission in the deed of sale to Irshad Husain of the receipt of the whole of the alleged purchase-money of Rs. 4,000 is subject to the same remarks as those already made as to the admission by Usman of the receipt of the Rs. 7,500 and Rs. 2,500.

As to the non-return of the Rs. 2,500, their Lordships cannot concur with the Subordinate Judge. He gives no sufficient reason for disbelieving the evidence of Fazl-ul-Rahman. All he says upon that subject is—"He" (meaning Usman) "has examined only one witness, Fazl-ul-Rahman, but what reliance can be placed on him and how can it be believed that the defendant took the money at the time of registration, and afterwards returned it?" It is not very clear that the money, although the Sub-Registrar was led to believe that Usman had received it in his presence, ever actually passed out of the control of those who brought it. Usman might, no doubt, have led the Sub-Registrar to suppose that the Rs. 2,500 which are said to have been there counted were placed under his control, notwithstanding a secret arrangement that the money should remain under the control of, and be carried away by, those who brought it. This is not very incredible when Usman's acknowledgment as to the receipt of the Rs. 7,500 is disbelieved. No explanation is given why Rs. 2,500, and Rs. 2,500 only, of the Rs. 10,000 stated in the

deed as the consideration should be actually paid when Usman made a false statement as to the Rs. 7,500.

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Faz-ul-Rahman, whom their Lordships see no reason to disbelieve, says—"I know Muhammad Usman and Mumtaz Ahmad. Muhammad Usman did not get the consideration-money of the sale-deed from Mumtaz Ahmad and others, in whose favour he executed it. I know this because I went with Sahib Ali Khan, my uncle, at the time of registration. When I went to the tahsil I saw Badulla, the servant of Sahib Ali Khan, and Nanhey Khan, the servant of Ali Ahmad, carrying the money in bags. I heard that there were Rs. 2,500. Mumtaz Ahmad and Sahib Ali Khan went inside, in presence of the Registrar. I heard the sound of the money being counted. After registration Muhammad Usman, Sahib Ali Khan and Mumtaz Ahmad came away. The money was with the same persons who carried it to the tahsil. These persons first took the money to the tahsil treasurer, and asked him to receive it on account of revenue due from Sahib Ali Khan and Ali Ahmad. I was present at that time. The treasurer said that the treasury was closed that day, and the money could not be received. These persons then went with the money to the house of Firasat Husain, and Sahib Ali Khan and I came to the house of Muhammad Haji, where we had put up. The servant of Firasat Husain came at 10 o'clock on the following day, and asked to have the money deposited in the tahsil. Sahib Ali Khan and I both came to the house of Firasat Husain, and stayed there for a short time. Sahib Ali Khan, Mumtaz Ahmad and I then went to the tahsil, the money being carried by the same persons. Some was received on account of revenue due from Sahib Ali Khan, and some on account of revenue due from Ali Ahmad. Mumtaz Ahmad is the brother of Ali Ahmad."

As to the second issues the Subordinate Judge has found that the deed of gift of the 12th February 1879 was a fictitious document and was null and void. It is not very clear whether he meant by the word fictitious that the deed was executed without the knowledge or consent of Himayat Fatma. That question is scarcely

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raised by the issue "did the deed of gift become null and void, and was possession held in accordance therewith?" The finding of the Subordinate Judge on the third issue seems to assume that the deed was executed. Be this as it may, however, their Lordships see no reason to distrust the report of the commissioner who was deputed by the Sub-Registrar to examine the old lady, and to whom she admitted the execution. That report was dated the 22nd of February 1879; it was believed by the Sub-Registrar; and upon the strength of it the deed was registered on that day.

The Subordinate Judge held that the deed was void as being a gift of undivided property. He adds that some of the properties are joint, and that such a gift is invalid under the Muhammadan law. Upon this point their Lordships would have been glad to have the opinion of the High Court. In their opinion the gift and possession taken under it transferred the property of Himayat to her daughter.

The opinion of the Subordinate Judge, who was a Muhammadan, must be taken in connection with his finding that the donee died before she could obtain possession; but, for the reasons given hereafter, their Lordships consider that that finding was erroneous.

The doctrine relating to gifts of *mushaa* was considered by this Committee in the case of *Ameeroonnissa v. Abedoonnissa* (1) and by the High Court in Calcutta in *Mullick Abdul Guffoor v. Muleka* (2). The facts of those cases differ from the present, but they throw light upon the doctrine.

It is unnecessary for their Lordships to express an opinion as to whether the gift in question was invalid or not, for it appears that, even if invalid, possession given and taken under it transferred the property.

The authorities relating to gifts of *mushaa* have been collected and commented upon with great ability by Syed Ameer Ali in his Tagore Lectures of 1884. Their Lordships do not refer to those lectures as an authority, but the authorities referred to show that

(1) 23 W. R., 208.

(2) I. L. R., 10 Calc., 1112.

possession taken under an invalid gift of mushaa transfers the property according to the doctrines of both the Shia and Sunni schools, see pages 79 and 85. The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules.

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In the course of his judgment the Subordinate Judge cursorily remarks that Himayat was an old lady, and was not in the proper enjoyment of her senses.

There is nothing in the evidence to show that the latter portion of that assertion was well founded, nor was there any issue upon the subject, nor anything in the report of the commissioner who examined her as to the execution of the deed, or in the statements of the relations who identified her, to raise an inference that she did not understand the nature and effect of the deed. There was nothing in the deed of a complicated nature or which required the exercise of any great mental powers to comprehend the meaning of it. The disposition was a probable one. The old lady and her daughter and granddaughters were living together; both mother and daughter were ill, and had been suffering from an epidemic. Usman, the mother's brother, was one of her heirs, and the daughter on the death of the mother would not have inherited any portion of the property, nor could the mother have devised the property to her by will. The property was small. Nothing could be more natural than that the mother should desire that in the event of her death her daughter and granddaughters, if they should survive her, should continue in the same moderate degree of comfort which they had enjoyed in her lifetime.

The lady had merely proprietary, not actual, possession of the greater portion of the property, that is to say, she was merely in receipt of the rents and profits. In the deed of gift she declared (an admission by which Usman as her heir and all persons claiming through him were bound) that she had made the donee possessor of all properties given by the deed; that she had abandoned all connection with them; and that the donee was to have complete



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control of every kind in respect thereof. Almad Hnsain, the daughter's husband, was the general manager of both mother and daughter, and would doubtless take care that the deed of gift should be carried into effect. Their Lordships have no doubt that sufficient possession was taken on behalf of the daughter to render the gift effectual. If possession were once taken and the deed of gift took effect, no subsequent change of possession would invalidate it.

On the 24th April 1879 Himayat Fatma by special power-of-attorney appointed Sheikh Himayat Ali as her general agent to present and verify a petition for mutation of names, and on the 28th a petition was accordingly presented on her behalf by Himayat Ali, by which, after reciting the deed of gift and that Zahur Fatma had been put into proprietary possession of the property, she prayed that after expunging her name from the Collectorate papers the name of Zahur Fatma, the daughter, might be entered therein. The usual proceedings were adopted, and on the 5th June 1879 a parwāna was issued by the Assistant Collector to the tahásildár, by which he was requested, amongst other things, to have the petition proclaimed and to cause an inquiry as to possession to be made. This was done, and on the 27th July the village patwári reported that Himayat Fatma had made a deed of gift of her own rights to her daughter, Zahur, and that the latter had obtained possession of the same in the place of Himayat Fatma, her mother. On the 28th July the tahásildár reported that he had caused the notification to be proclaimed, and that it was evident from the report of the patwári that Zahur Fatma had obtained possession of the property specified in the gift in the place of Himayat Fatma.

Notwithstanding the proclamation, neither Usman nor any other person raised any objection to the mutation, and accordingly on the 4th February 1880 an order for the mutation of names was granted.

Zahur Fatma died on the 3rd of December 1879, and Himayat Fatma, her mother, on the 4th January 1882. The order for mutation was consequently after the death of Zahur. Mutation of names in the Collector's office was not actually necessary to com-

plete the transfer of possession under the deed of gift. But the order for mutation is important as showing that no objection was made to the mutation, and that the report of the patwári made during the lifetime of Zahur as to the execution of the deed of gift and of the transfer of possession under it which had been adopted by the tahsildár was also adopted and acted upon by the Deputy Collector.

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Their Lordships have no doubt that upon the evidence, and especially in the absence of any objection by Usman in the lifetime of Zahur, the Subordinate Judge ought to have found the second issue in favour of the defendants, and their Lordships do so now.

The reasons of the Subordinate Judge in support of his finding that the donee died before she obtained possession are weak and unavailing. First, he relies upon five decrees in suits brought in the name of Himayat Fatma for rent which accrued after the date of the deed of gift, and also upon one payment of revenue made in her name on the 26th November 1879, but the suits were commenced and the revenue paid before the mutation of names in the Collector's office at a time when actions for rent and payment of revenue would in all probability be brought and made in the name of the person entered as the proprietor in the Collector's book. A similar remark applies to the order of the Assistant Collector in January 1880, in which he speaks of Himayat Fatma as the person in possession. This order, it should be remarked, was made after the reports of the patwári and of the tahsildár that Zahur was in possession, but before they had been adopted by the Assistant Collector and the order for mutation made. Then the Subordinate Judge makes a point of Himayat's continuing to occupy one of the pukka houses intended for females included in the deed of gift, as if the daughter after she had obtained possession under the deed of gift would, in order to complete her title, have turned her mother out of the premises altogether, and have refused to allow her to continue to occupy the house in which she had previously lived at a time when one moiety belonged to herself and the other to her daughter. Such an argument is as futile as the

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following one, wherein he says: "The revenue receipt is filed as No. 128, and the order as No. 136, with the record. At the first page of the deed of gift, the last pukka house intended for females is entered as occupied by the donor, who, having made a gift of it, continued to occupy it herself. How can such a gift be valid? A very strong reason to believe the gift to be false is that, if Zahur Fatma had become the absolute owner and acquired possession under the gift, two things must needs have happened after her death, namely, in the first place, her husband, Ahmad Husain, would not have taken any proceeding tending to set aside the gift, because his object to acquire the property had been obtained. Some of the property would devolve on him and some on his daughters, and a sixth share only would go to the mother. So he would have contented himself to take steps to acquire only that one-sixth share, and would not have troubled himself about the rest. But he did not do so. He took steps to acquire the whole property."

As though a fraudulent attempt on the part of Ahmad Husain to acquire the whole property for himself instead of only a portion of it was a strong argument in the face of all the other evidence to prove that the deed of gift was false and had no existence at all. It is unnecessary to refer to the other arguments of the Subordinate Judge in support of his finding on the second issue. They are utterly valueless.

That Ahmad Husain was not the honest man that the Subordinate Judge treats him to have been, who would have contented himself to take steps to acquire the sixth share which went to the mother, and would not have troubled himself about the rest, is shown by the plaintiffs' (appellants') own case, for it is there said: "Ahmad Husain, alleging a parol gift, without date, from Himayat Fatma to himself, applied seven days after his wife's death, *i. e.*, on the 10th December 1879, for the transfer of possession in a number of villages from Himayat to him in accordance with that alleged gift, and at the same time he applied, in fraud of his own daughters, for the transfer to him, as heir of his deceased wife, of her share, and obtained various collusive and false reports from

kanungos and other native local officers, and an order, dated the 19th November 1880, for the registration of his own name in respect of the entire estates of Himayat and of Zahur. It is sufficient to say here, of those proceedings, that the first Court has found, and there is now, as is submitted, no question remaining, that the claims of Ahmad Husain to the properties now in suit were unfounded and 'improper.'"

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The appellants rely on Ahmad Husain's having, from Himayat's death to the time of his own death, remained in possession under an order of the 10th November 1880 for mutation of names, and on the first four defendants, his daughters, having, upon his death, applied for mutation of names to themselves as his heirs; but this argument does not assist the plaintiff's case, for the order of the 19th November was obtained with the assent of the daughters of Zahur, and subject to the following proviso. In their petition of the 4th February 1880, speaking of their father, Chaudhri Ahmad Husain, they say: "Husaini Jan and Hajira Jan having filed a petition in the tahsil of Etah for the entry of their names instead of that of their mother, Zahur Fatma, and having included therein our names also, we submit that we and the objectors are five own sisters and are the heirs and proprietors of the property of our deceased mother, and with our consent our father, Ahmad Husain, continues, as usual, in possession of the villages, and he too is an heir of the deceased with right of inheritance to her property. The said Chaudhri and we are joint, and possession by him is our possession. We therefore have no objection to his name being, during his life, entered instead of ours; but with this proviso that such arrangement be now made that our shares be saved from other claimants, and that we do not thereby ever lose our rights; and he must, during his lifetime, provide for us properly. We accordingly submit that, with the above proviso, the name of Chaudhri Ahmad Husain be entered instead of ours."

Upon the whole their Lordships will humbly advise Her Majesty to reverse the decree of the Subordinate Judge and both the decrees of the High Court, to order the plaintiffs to pay to all the defend-

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ants, except the representatives of Muhammad Usman, who is dead, their costs in the Courts below, that a finding be entered for the defendants on the first issue that the amount of the consideration was not paid, and that the Rs 2,500 were taken back; and upon the second issue, that the deed of gift in favour of Zahur Fatma was executed with the authority of Himayat Fatma, that possession was taken under it, and held in accordance therewith, and that the possession taken under the deed transferred the property; and that upon those findings a decree be given for the defendants, and that it is unnecessary to record any finding upon the other issues.

The appellants must pay the costs of the appeal to Her Majesty in Council.

*Appeal dismissed.*

Solicitors for the appellants: Messrs. *Barrow and Rogers.*

Solicitors for the first six respondents: Messrs. *Watkins and Lattey.*

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## CRIMINAL REVISIONAL.

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*Before Mr. Justice Brodhurst.*

**RUKMIN (PETITIONER) v. PEARE LAL (OPPOSITE PARTY).**

*Husband and wife—Maintenance of wife—"Cruelty"—Criminal Procedure Code, s. 488.*

The word "cruelty" in s. 488 of the Criminal Procedure Code is not necessarily limited to personal violence. *Kelly v. Kelly* (1) and *Tomkins v. Tomkins* (2) referred to.

THIS was a reference under s. 438 of the Criminal Procedure Code by the Sessions Judge of Allahabad. The facts are sufficiently stated in the judgment of the Court.

Babu *Jogindro Nath Chaudhri* for the petitioner Musammat Rukmin.

Mr. *C. Dillon* for Peare Lal.

BRODHURST, J.—I concur with the Sessions Judge that this case, which has been brought by a wife against her husband, under s. 488

(1) L. R., 2 P. D., 69, (2) 1 S. & T., 168.

of the Criminal Procedure Code, for maintenance, has been disposed of by the Magistrate in too summary a manner.

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It is alleged that the Magistrate did not allow the examination-in-chief of the petitioner to be conducted by her pleader, that he himself asked her only a few preliminary questions, that he refused to examine any of her witnesses, and that he rejected her application "because she only alleges three occasions of ill-treatment, and the last of these was a year ago," but that if the petitioner, who is a native lady unaccustomed to appear in the Courts, was examined with patience and consideration she would be able not only to show that she still bears the scar of a wound inflicted by her husband, but that she with the assistance of her witnesses would prove that her husband has habitually treated her with cruelty.

If the petitioner can prove the latter allegations, she will be entitled under the provisions of s. 488 of the Criminal Procedure Code to receive an allowance from her husband.

The Magistrate appears to have thought that nothing except personal violence would constitute "cruelty" within the meaning of the section above mentioned; but that is not so. There can be legal cruelty without the use of actual physical violence by the husband towards the wife, as is shown in *Kelly v. Kelly* (1), where it was held,—“If force, whether physical or moral, is systematically exerted to compel the submission of a wife to such a degree and during such a length of time as to injure her health and render a serious malady imminent, although there be no physical violence such as would justify a decree, it is legal cruelty and entitles her to a judicial separation.” And in *Tomkins v. Tomkins* (2) the Judge Ordinary observed that whether there had or had not been cruelty was a question of fact. “The Court will direct the jury in cases coming before a jury, what acts constitute legal cruelty, and they will have to find whether the acts done are cruelty or not,” and the question is whether “the husband has so treated his wife and so manifested his feelings towards her as to have inflicted bodily injury, to have caused reasonable apprehension of bodily suffering, or to have injured

(1) L. R., 2 P. D., 59. (2) 1 S. & T., 168.

1889 health." I set aside the Magistrate's proceedings and I direct  
 RUKMIN that he take the evidence of the petitioner and her witnesses and  
 v. otherwise dispose of the case in accordance with law and the above  
 PHARR LAL. remarks, after having recorded a finding whether or not Lala Peare  
 Lal has habitually treated his wife, the petitioner, with cruelty.

'1889  
 July 24.

### APPELLATE CIVIL.

*Before Sir John Edge, Kt., Chief Justice and Mr. Justice Straight.*

BUDDHU LAL (DECREE-HOLDER) v. BEKKHAB DAS (JUDGMENT-DEBTOR).\*

*Execution of decree—Decree payable by instalments—Default—Waiver—  
 Limitation.*

A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years; and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884 the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887 he made another application for execution, in which he relied on the same default.

*Held* that the default if it was one had been waived by the decree-holder, and that such waiver was a good defence to the present application. *Mumford v. Peal* (1) and *Asmutullah Dalal v. Kally Churn Mitter* (2) distinguished.

THIS was an appeal under s. 10 of the Letters Patent from the following judgment of Tyrrell, J. :—

TYRRELL, J.—This is a very simple case. The parties agreed, and an order of Court was made, that the judgment-debtor should satisfy the decree-holder's claim against him by monthly payments of two rupees to be followed by the payment of such a sum in the twelfth year after the decree as would clear off the entire claim of the decree-holder. The decretal order to this effect was made on the 16th May 1881, and this decretal order did not state from what date to what date each instalment was to be reckoned; that is to say, it was not recorded whether the months were to be counted from the 16th May 1881, to the 16th June 1881, and so on for future time, or whe-

\* Appeal under s. 10 of the Letters Patent.

(1) I. L. R., 2 All., 867. (2) I. L. R., 7 Calc., 56.

ther the word "monthly" meant from the 1st of each month to the last day of each month subsequent to the 16th May aforesaid. The effect was that the judgment-debtor regularly on the 16th of each month paid his two rupees to the decree-holder down to the month of December 1884. That instalment of two rupees for November-December 1884 was not taken into his possession by the decree-holder until the 18th or 19th December 1884. Subsequent to that month it is found by the Lower Appellate Court that the decree-holder continued to take his two rupees a month regularly from his judgment-debtor. Under the circumstances the Lower Appellate Court, agreeing with the Court of first instance, has found that the decretal order was ambiguous in respect of the precise date for the payment of the instalments, so that the Courts were unable to say with certainty whether the 16th of each month was the only date upon which the payment could be made in conformity with the decretal order; and the Lower Appellate Court further found that if there had been any irregularity in the payment for December 1884, it would not disentitle the judgment-debtor to the advantages of the instalment arrangement, inasmuch as the decree-holder waived his right to execute the entire decree, and obtained a new agreement from his judgment-debtor, whereunder he continued to take monthly instalments from him as before the month of December 1884.

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The learned Judge in first appeal, therefore, decided that the application made by the decree-holder now long after the condoned irregularity of December 1884, to execute the entire decree because of the judgment-debtor's default to pay his instalments, should not be allowed. I entirely concur with the Court below. In the first place, I agree that there is no evidence that the 16th of each successive month was the only legal date for the payment of the instalment. In the second place, I cannot disturb the finding of the Lower Appellate Court on the fact of waiver. It is true that a question of law is involved in the finding of waiver, but that is no reason for thinking that the Lower Appellate Court has erred in arriving on the evidence before it at the finding it has come to. Thirdly, there is another reason for upholding the decision of the lower Court,



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which is to be found in the circumstance that the Court executing the decree ascertained from the evidence before it that the payment of two rupees for December 1884 was tendered by the judgment-debtor to the decree-holder, who designedly delayed acceptance of the same in order to build up for himself the materials for the pretension he now puts forward to break up the instalment arrangement and enforce the execution of his decree as a whole. I dismiss the appeal with costs.

From this decision the decree-holder appealed under s. 10 of the Letters Patent.

Pandit *Sundar Lal* for the appellant.

Mr. *J. Simeon* for the respondent.

EDGE, C.J.—In this case a decree by consent was made for payment of the decreed amount by monthly instalments running over twelve years. It was provided that on default the creditor might execute the decree as a whole, that is, for the balance then due. In 1883, what the appellant here, who was the creditor, calls a default was made.

Apparently he prevented the payment being made on the stipulated day. He subsequently received instalments on the day fixed, assuming that that day was the 16th of the month, or if not on some other day: at any rate he received the instalments which were paid down to the date of the filing of the present application for execution on the 30th of January 1887. The date of the default on which he relied was, we are informed, the 16th December 1883. He had filed an application in 1884 for execution in respect of that default, but did not proceed with it. It is contended here that he can now rely on the default of the 16th December 1883. In my opinion he waived that default if it was one. It is contended on his behalf that there could be no waiver. The case of *Mumford v. Peal* (1) has been cited, and also the case of *Asmutullah Dalal v. Kally Churn Mitter* (2). The case in this Court turned on the somewhat peculiar facts of the case, and does not, I think, apply. The case in the Calcutta Court was a question of limitation, and

(1) I. L. R., 2 All., 857.

(2) I. L. R., 7 Calc., 56.

looking to the judgment of the Judges there, I do not think that they would have held there could be no such waiver as has been contended for here. I think that at page 59 can be gathered an indication of what those Judges would possibly have said in this case. In dealing with cl. (6) of art. 179. sch. ii, Limitation Act (XV of 1877), they drew the distinction between the execution of a decree as a whole and the case of certain sums to be paid at dates certain. They say: " But the decree nowhere directs that the payment of the whole amount outstanding shall be made at a certain date. It only gives the decree-holder the option of applying for execution of the whole decree still unsatisfied, upon the occurrence of default in three of the prescribed instalments. Under the decree, therefore, the decree-holder had several courses open to him, subject, of course, to the rules of limitation. " In cases of this kind I am of opinion that where there has been a default which would entitle the decree-holder to execute the decree as a whole, he must do so within three years of the default. But if he does not choose to execute the decree as a whole, he can go on receiving the instalments at the time fixed for the receiving of the instalments; and if, any of those instalments are not paid, he can, within three years execute the decree for that instalment. I do not think that the Calcutta Court in the case to which I have referred is against the view of the law which I hold. I am clearly of opinion there was a waiver here, and that that waiver is an answer to the application to execute the decree as a whole, and that this appeal should be dismissed with costs.

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STRAIGHT, J.—I am of the same opinion. My brother Tyrrell, before whom this appeal came from the decision of the Judge of Mainpuri, was of opinion that the decisions of the two lower Courts were right in holding that after the month of December 1883, when the decree-holder said the default was made by the judgment-debtor, the decree-holder had received from his judgment-debtor no less than three years' monthly instalments, and that while he had in fact, on the 2nd of January 1887, accepted the last monthly instalment of two rupees, he nevertheless came into Court on the 3rd of the

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same month with this application, treating the matter as if nothing had been paid in the interim, and going back to the month of December 1883 as the date of the default which had been the ground of the original application for the execution of the whole decree. If the argument of the learned pleader for the decree-holder were carried to its logical conclusion, he might, by merely filing an application every three years, have gone on receiving instalments till the eleventh year, and then have come in and asked for the execution of the whole decree, which seems to me absurd. There is enough stated in the judgments of the two first Courts to satisfy me, as it satisfied my brother Tyrrell, and satisfies the learned Chief Justice, that there was a waiver by the decree-holder of his right to execute his whole decree in respect of the alleged default in December 1883. I may, however, add that the two first Courts on the evidence came to the conclusion that there never was any real default at all. On that finding alone my brother Tyrrell was right. The appeal is dismissed with costs.

*Appeal dismissed.*

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 August 5.

*Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.*  
 RAJ SINGH AND ANOTHER (JUDGMENT-DEBTORS) v. PARMANAND  
 (DECREE-HOLDER).\*

*Mortgage—Decree for sale of mortgaged property—Decree not satisfied by sale—Recovery of balance due on mortgage—Act IV of 1882 (Transfer of Property Act), ss. 88, 89, 90.*

The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree.

THIS was an appeal from a decree of the District Judge of Aligarh reversing a decree of the Munsif of Haveli. The judgment of the District Judge was as follows:—

“In this case the appellant had obtained a decree against the respondents as legal representatives and heirs of a mortgagor under the terms of s. 88 of the Transfer of Property Act. The mortgaged

\* Second Appeal No. 1099 of 1888 from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated the 4th July 1888, reversing a decree of Maulvi Saiyid Akbar Husain, Munsif of Haveli, dated the 21st March 1889.

property was eventually brought to sale, but the proceeds were insufficient to satisfy the decree debt. The decree-holder then applied praying that the Court would pass a further decree under s. 90 of that Act for the balance due on the mortgage. The Munsif, relying on the case of *Pran Kuar v. Durga Prasad* (1), refused the application. But that case is not to the point, the original decree having been issued in 1881 before the passing of the Transfer of Property Act. The respondents contend that as in the decree against them no order was passed that any other property than that charged with the debt should be sold, the provisions of ss. 13 and 43 do not allow the claim now made by the appellant. If the proceedings under s. 90 of the Transfer of Property Act could be described as a fresh suit, s. 43 would apply. But reading ss. 88, 89 and 90 of that Act together, it is clear that they contemplate a further decree in the same suit, when the proceeds of the sale are insufficient to satisfy the debt. The language of s. 88 of the Transfer of Property Act, and the form of a decree for the sale in a suit by a mortgage, No. 128 in sch. IV of the Code of Civil Procedure, and the form for a decree under s. 88 of the Transfer of Property Act as issued by the High Court, agree in omitting any reference to the relief to be granted to the plaintiff in the event contemplated by s. 90 of the Transfer of Property Act. The decree-holder is entitled to have a further decree under s. 90 of the Transfer of Property Act, if the balance is legally recoverable from the defendants. The case must therefore be remanded to the lower Court for the determination of this issue; and if it be determined in favour of the appellant, for the passing of a decree under s. 90 of the Transfer of Property Act. The appeal is admitted. The case is remanded under s. 562 of the Civil Procedure Code to be disposed of with reference to the remarks made above. The costs of this appeal will follow the costs of the application to the lower Court."

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The judgment-debtors appealed to the High Court.

Babu *Jogindro Nath Chaudhri* for the appellants.

Pandit *Sundar Lall* for the respondent.

(1) I. L. R., 10 All., 127.

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EDGE, C.J., and TYRELL, J.—The only point in this case is whether the decree contemplated by s. 90 of the Transfer of Property Act can be made in the suit in which the decree for sale was passed, or whether a fresh suit must be instituted to obtain such decree. There is nothing in the Act to suggest that a fresh suit is necessary; and there is everything to suggest that it is not. If it were intended that a fresh suit should be brought, that intention would have been given effect to by the introduction of appropriate words into s. 90.

We dismiss the appeal with costs (1).

*Appeal dismissed.*

1889  
 August 14.

*Before Mr. Justice Straight and Mr. Justice Tyrrell.*  
 BANWARI LAL (Plaintiff) v. SAMMAN LAL (Defendant).<sup>\*</sup>  
*Civil Procedure Code, ss. 562, 564—"Suit."*

S. 562 of the Civil Procedure Code authorizes a remand only where the entire suit and not merely a portion of it has been disposed of by the Court below upon a preliminary point.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Mr. *Amiruddin* for the appellant.

Mr. *Simeon* for the respondent.

STRAIGHT, J.—This is an appeal from an order of remand. The suit brought by the plaintiff-respondent was one in which he claimed two reliefs: first, he asked for an injunction to defendant, restraining him from interfering with his, the plaintiff's, erection upon the roof of his own house of certain buildings; secondly, he claimed a right of easement over the roof of the defendant's house in order to give him access to the roof of his own house. The first Court decreed the plaintiff's claim for an injunction, but as to his second head of claim, it said that upon the face of the plaint the statement of the easement claimed was so inadequate and unsatisfactory that it was impos-

<sup>\*</sup> First Appeal No. 66 of 1889 from an order of Maulvi Saiyid Muhammad, Subordinate Judge of Saharanpur, dated the 20th April 1889.

(1) See also *Sonatum Shah v. Ali Newaz Khan*, I. L. R., 16 Calc., 423.

sible for it to enter into the question thereby raised. Accordingly it decreed the plaintiff's claim in part and dismissed it in part. The plaintiff appealed to the Subordinate Judge and the defendant filed an objection as to the order of the first Court in the matter of costs. The learned Subordinate Judge upheld the decision of the first Court in regard to the first head of relief sought by the plaintiff, but he was of opinion as to the first Court's dismissal under the second head that the reasons given were insufficient and unsatisfactory, and that it ought to have tried the case. Thereupon, as regards this second head of claim, the Subordinate Judge made an order under s. 562 of the Civil Procedure Code. That order is assailed by Mr. *Amiruddin* for the defendant. His contention is that under the law the Subordinate Judge had no power to make a general order of remand, and that the *suit* had not been disposed of on a preliminary point, but that only a *part* of the *suit* had been disposed of on a preliminary point, and s. 562 was inapplicable. I think this contention is sound. We are told by s. 564 of the Civil Procedure Code that a case shall not be remanded "for second decision, except as provided in s. 562." We, therefore, have to look to see whether this case does fall within the four corners of that section. We must take the words of the statute as we find them; and the words of that section are these:—"If the Court against whose decree the appeal is made has disposed of the *suit* upon a preliminary point, &c." Now the word used there is in distinct and precise terms the "*suit*;" it does not say any portion of the *suit* or any part of the relief claimed in the *suit*, but the word *suit* is used. I take it to mean that where a *suit* in its entirety has been thrown out by a first Court upon a preliminary point, under these circumstances, and these circumstances only, has the Appellate Court power to remand it under s. 562 of the Civil Procedure Code. I hold, therefore, that Mr. *Amiruddin's* objection is a good one and must prevail, and that the order of the learned Subordinate Judge, in so far as it deals with the second head of claim and the question of costs, and directs a remand under s. 562 of the Civil Procedure Code, must be set aside. The consequence of this order will be that the appeal to that extent will be restored to the file of pending appeals in his Court, and he will take up and dispose of it from the point where he dealt with the first head of the plaintiff's claim. If it becomes necessary to make a remand under

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s. 566 of the Civil Procedure Code or to exercise the powers conferred under s. 568, Civil Procedure Code, he will do so. The costs of this appeal will follow the result.

TYRRELL, J.—I quite concur. It seems to me that the law in s. 562 of the Civil Procedure Code assumes that there has been no trial, and that it authorizes a Court of first appeal to proceed with the trial. Now in the case before us, there has been a trial and a decree upon the merits in respect of a portion at least of the case.

*Cause remanded.*

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November  
12.

### FULL BENCH.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.*

ABDULLA (PLAINTIFF) v. MOHAN GIR AND OTHERS (DEFENDANTS).<sup>\*</sup>  
*Act XVII of 1886 (Jhānsi and Morar Act)—Legislative power of the Governor-General in Council—Indian Councils Act (24 and 25 Vic., c. 67), s. 22—"Indian territories now under the dominion of Her Majesty"—"Said territories"—28 and 29 Vic., c. 17, preamble—32 and 33 Vic., c. 98, s. 1—Construction of statutes.*

Act XVII of 1886 (the Jhānsi and Morar Act) is not *ultra vires* of the Governor-General in Council; and the town and fort of Jhānsi are subject to the jurisdiction of the High Court for the N.-W. Provinces in the same manner as the rest of the Jhānsi district.

The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which, at the date when the Indian Councils Act (24 and 25 Vic., c. 67) received the royal assent (i.e., the 1st August 1861), were under the dominion of Her Majesty. In the preamble to the 28th and 29 Vic., c. 17, and in s. 1 of the 32 and 33 Vic., c. 98, Parliament has placed this construction upon s. 22 of the Indian Councils Act.

Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the

<sup>\*</sup> Second Appeal No. 1052 of 1887 from a decree of G. R. C. Williams, Esq., Deputy Commissioner of Jhānsi, dated the 4th April 1887, reversing a decree of G. B. Crawley, Esq., Extra Assistant Commissioner of Jhānsi, dated the 5th January 1887.

Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. *The Postmaster-General of the United States v. Early* (1) referred to.

It must be presumed that the laws and regulations of the Governor General in Council are known to Parliament. *Empress v. Burah* (2) referred to.

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THIS was a reference to the Full Bench by Straight and Mahmood, JJ., of the question "whether the town and fort of Jhānsi are subject to the jurisdiction of this Court in the same manner as the rest of the Jhānsi district."

The suit in which the reference was made was instituted on the 16th August 1886 in the Court of the Extra Assistant Commissioner of Jhānsi. It was brought to enforce an alleged customary right of pre-emption in respect of the sale of a house situated in the town of Jhānsi, where the parties resided. The Court of first instance, on the 5th January 1887, decreed the claim. On appeal by the defendants, the Deputy Commissioner of Jhānsi reversed the decree and dismissed the suit. The plaintiff presented a second appeal to the High Court.

The appeal came, in the first instance, before Mahmood, J., who referred it to a Division Bench. At the hearing before the Bench (which consisted of Straight and Mahmood, JJ.) the question stated in the order of reference was raised. It involved the further question whether the Governor-General in Council had power to pass the Jhānsi and Morar Act (XVII of 1886) by virtue of the provisions of which civil and criminal jurisdiction was given to the High Court over the town and fort of Jhānsi and adjacent lands, or whether the Act was in excess of the powers conferred on the Indian Legislature by s. 22 of the Indian Councils Act, 24 and 25 Vic., c. 67.

The territories of the Raja of Jhānsi lapsed to the British Government on the death of the Raja without heirs male in 1853. From their annexation they formed part of the North-Western Provinces (3).

(1) Curtis' Reports of Decisions in the Supreme Court of the United States, p. 86. (3) Aitchison's Treaties, vol. ii, p. 190; Hunter's Gazetteer, vol. vii, p. 219; Whalley's Law of the Extra Regulation

(2) I. L. R., 3 Calc., at p. 143; L.R., 3 App. Cas. at p. 907; L.R., 5 I. A., at p. 196; I. L. R., 4 Calc., at p. 183. Tracts, p. 306, *et seq.*



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By treaty dated the 12th December 1860, the British Government ceded the town and fort of Jhānsi in full sovereignty to the Maharaja Scindia. The transfer was completed on the 1st April 1861 (1).

By *kharita*, dated the 24th February 1886, the British Government restored to the Maharaja Scindia the cantonment of Morar, in exchange for which His Highness, on the 10th March 1886, made over in full sovereignty to the British Government the town and fort of Jhānsi (2).

By proclamation dated the 10th June 1886, under the 28 and 29 Vic., c. 17, s. 4, the Governor-General in Council declared that the town and fort of Jhānsi should be subject to the Lieutenant-Governorship of the North-Western Provinces (3).

On the 17th September 1886, the Jhānsi and Morar Act (XVII of 1886) received the assent of the Governor-General. The preamble to part I of the Act recites, *inter alia*, the cession of the town and fort of Jhānsi to the British Government and their incorporation in the North-Western Provinces.

Section 2 enacts that "the town and fort of Jhānsi, and the lands which may be ceded to the British Government in accordance with the proposal referred to in the preamble to this Part, shall, in the case of the town and fort from the commencement of this Act, and, in the case of any of the lands, from the date of the cession thereof, be deemed to be part of the Jhānsi district."

Section 3.—"All enactments which, at the commencement of this Act, or at the date of the cession of any of the lands referred to in the last foregoing section, are or shall be in force in the Jhānsi district and not in the town and fort of Jhānsi or in those lands, shall then come into force in the town and fort or in those lands as the case may be."

Section 4.—"On and from the commencement of this Act, or the date of the cession of any of those lands, as the case may be, the

(1) Aitchison, vol. iii, pp. 262, 316; *N.*- (2) "Administration of the N.-W. W. Provinces Gazetteer, vol. i, p 439. Provinces and Oudh, 1882-87," p. 124.

(3) *Gazette of India*, June 12th, 1886, Part I, p. 376.

town and fort of Jhānsi and the lands shall be deemed to form part of the district of Jhānsi mentioned in Part IV of the first schedule to the Scheduled Districts Act, 1874."

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Among the enactments which at the commencement of the Act were in force in the Jhānsi district were the Jhānsi Courts Act (XVIII of 1867) and the Codes of Criminal and Civil Procedure. It was not disputed that the High Court had jurisdiction over the Jhānsi district generally.

The doubt raised at the hearing of the appeal in regard to the validity of Act XVII of 1886, and consequently in regard to the jurisdiction of the High Court in cases coming from the town and fort of Jhānsi, had reference to the terms of s. 22 of the Indian Councils Act, which (so far as they need be referred to) are as follows:—

"The Governor-General in Council shall have power at meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending or altering any laws or regulations whatever now in force or hereafter to be in force in *the Indian territories now under the dominion of Her Majesty*, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever within *the said territories* and for all servants of the Government of India within the dominions of Princes or States in alliance with Her Majesty, and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in any wise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of Fort St. George and Bombay respectively in Council or the Governor or Lieutenant-Governor in Council of any Presidency or other territory for which a Council may be appointed with power to make laws and regulations under and by virtue of this Act."

It was suggested that the words here italicized limited the legislative powers of the Governor-General in Council to making

1889 laws and regulations for the Indian territories which, at the  
 ABDULLA date when the Indian Councils Act received the Royal assent  
 v. (i.e., the 1st August 1861), formed part of the dominions of Her  
 MOHAN GIR. Majesty; and that he had consequently no power to pass an Act,  
 such as Act XVII of 1886, for the town and fort of Jhānsi which  
 did not (after December 1860) form part of those dominions until  
 1886.

This led to the reference to the Full Bench of the question above stated. Several other cases, both civil and criminal, which raised the same question, were subsequently included in the reference. The Court, in view of the importance of the point raised, directed that notice should be given to the Government of India, so as to afford the Government an opportunity of being heard by counsel.

Mr. A. Strachey, for the Government of India as *amicus curiæ*—  
 It will not be disputed that the Government of India has power to acquire territory by conquest or cession.

[STRAIGHT, J.—If the Governor-General in Council has power to cede territory, and to take other territory in exchange, it hardly seems going much further to say that he has power to make laws for the territory so acquired (1).]

That is what I shall contend. But in the first place, s. 22 of the Indian Councils Act cannot be construed as limiting the legislative powers of the Governor-General in Council to the territories which, when that Act was passed, were under the dominion of Her Majesty.

(1) See, in reference to this point, the observations of the Supreme Court of Calcutta in *Ouseley v. Plowden* (Boulnois, p. 145), decided in 1857 on the construction of the 3 and 4 Wm. IV, c. 85, s. 43 of which was worded in terms similar to those of s. 22 of the Indian Councils Act, 1861. The Court (following the opinion of Sir Barnes Peacock, then Law Member of Council), held in substance that the statutory powers of the Governor-General in Council of making war and contracting treaties carried with them by

implication power to acquire territory by conquest or cession, and that the power to acquire territory by conquest or cession carried with it the power to govern such territory. See also *American Insurance Company v. Canter* (Curtis, 685; 1 Peters, 511), decided by the Supreme Court of the United States of America; Kent's Commentaries, vol. i, p. 432, *note*; Story's Constitution of the United States, vol. ii, pp. 166-170, 171; Gardner's Institutes, pp. 39-40.

The effect of s. 22 is recited in the preamble to the 28 and 29 Vic., c. 17, where the words used are "within the Indian territories under the dominion of Her Majesty," the word "now" being omitted (1).

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Again, the 32 and 33 Vic., c. 98, s. 1, expressly gives power to the Governor-General in Council, after the 11th August 1869, to make laws and regulations "for all persons being native Indian subjects without and beyond as well as within the Indian territories under the dominion of Her Majesty" (2). Here again the word "now" is omitted. See also the preamble.

These provisions amount to a legislative declaration by Parliament that the effect of s. 22 of the Councils Act is not to be limited by the word "now" to territories acquired by the Crown at any particular time, and that the Governor-General in Council may make laws for any part of British India whenever annexed. The 32 and 33 Vic., c. 98, s. 1, is more than a mere recital of existing law: it is a substantive enactment, and must be treated as making the law such as it declares it to be. Where a matter of fact or of law is recited in an Act of Parliament, the recital, though not conclusive, is very strong evidence that the fact or law is as stated. And even if a recital is incorrect as a statement of existing law, it may be so expressed as to operate as law in future. This is so even where only an opinion as to existing law, and not an intention to make new law, is expressed: *The Postmaster-General of the United States v.*

(1) "Whereas by an Act passed in the session holden in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter sixty-seven, it was among other things enacted that the Governor-General of India in Council shall have power, at meetings for the purpose of making laws and regulations, to make laws and regulations for all persons, whether British or native, foreigners or others, within the Indian territories under the dominion of Her Majesty, and for all servants of the Government of India within the dominions of Princes and States in alliance with Her Majesty: and whereas it is expedient to

enlarge the said power by authorizing the Governor-General of India in Council to make laws and regulations for all British subjects of Her Majesty within the dominions of such Princes and States, &c.

(2) "From and after the passing of this Act, the Governor-General of India in Council shall have power at meetings for the purpose of making laws and regulations, to make laws and regulations for all persons being native Indian subjects of Her Majesty, Her heirs and successors, without and beyond as well as within the Indian territories under the dominion of Her Majesty."

1889 *Early* (1) ; Wilberforce on Statute Law, pp. 15, 16. This is the case with the 32 and 33 Vic., c. 98, s. 1, assuming even, for the sake of argument, that the construction which it placed upon s. 22 of the Indian Councils Act was erroneous. The difficulty arising from the use of the word "now" in that section has therefore been removed by later legislation.

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[EDGE, C.J.—If s. 22 of the Councils Act were read literally, there might be this result, that territory which, on the 1st August 1861, when the statute received the Royal assent, was under the dominion of Her Majesty, but which was subsequently ceded to a foreign power, would still be a territory within the description, and the Governor-General in Council might make laws for it, though it had ceased to be part of British India or to belong to the Crown.]

The agreement contained in the treaty of the 12th December 1860 for the cession of the town and fort of Jhānsi to Scindia was not completely given effect to until the 1st April 1861. If the transfer had been delayed for another four months, the territory would have fallen within the terms of s. 22.

The argument based on the preamble to the 28 and 29 Vic., c. 17, and s. 1 of the 32 and 33 Vic., c. 98, is much strengthened by a consideration of the objects of those statutes. By s. 22 of the Councils Act the Governor-General in Council was authorized to make laws for all servants of the Government of India in Native States. The 28 and 29 Vic., c. 17, s. 1, enlarged this power by extending it to all British subjects in Native States, whether servants of Government or otherwise; and by s. 2 this provision is to be read as part

(1) Curtis' Reports of Decisions in the Supreme Court of the United States, p. 86. The effect of this decision is stated in Wilberforce, at p. 16. The question was whether a particular class of suits would lie in the circuit courts of the United States; and the jurisdiction was based on an enactment which provided that the district (or state) courts should have cognizance of such, suits "concurrent with the circuit courts of the United States." Marshall, C.J., (at p. 91 of the report said:—"It is true that the language of the section indicates the opinion that jurisdiction existed in

the circuit courts rather than an intention to give it; and a mistaken opinion of the Legislature concerning the law does not make the law. But if this mistake is manifested in words competent to make the law in future, we know of no principle which can deny them this effect. The Legislature may pass a declaratory Act, which, though inoperative on the past, may act in future. This law expresses the sense of the Legislature on the existing law as plainly as a declaratory Act, and expresses it in terms capable of conferring the jurisdiction."

of s. 22 of the Councils Act. Under the Councils Act itself, therefore, the Governor-General in Council can, to the extent stated, make laws having force in (*e.g.*) the State of Gwalior.

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Further, the 32 and 33 Vic., c. 98, s. 1, authorized him to make laws for all native Indian subjects at places beyond as well as within the Indian territories of Her Majesty. To this extent he can make laws having force in Afghanistan or Persia.

Hence, if the Governor-General in Council cannot legislate for portions of territory ceded by or conquered from native or foreign States, Parliament must have intended that cession or conquest should, *pro tanto*, diminish his powers; that he should have greater extra-territorial than intra-territorial authority. Upon this supposition he can make laws having force in Hyderabad, or even in China or Japan, which he cannot make for parts of Bombay and the Panjab. Upon the same supposition, although Parliament trusted him to make laws for Bengalis in the town of Jhānsi, or for Englishmen in Mandalay in 1885, it no longer trusts him to make laws for the same persons when, in 1886, the same places have become wholly subject to his executive government. By bringing certain territory within the limits of British India, the powers of the Indian Legislature over that territory are abolished. And if such territory should again be ceded to a Native State, or otherwise cease to form part of British India, the powers of the Indian Legislature over it would *ipso facto* revive. Parliament can never have intended that s. 22 of the Councils Act should be construed in a manner which involves these results.

[STRAIGHT, J.—You can reduce the idea to an absurdity. Suppose the case of a piece of land in British India which juts out into a Native State, and a part of that State, on which ten or a dozen squatters, who are British subjects, are settled, projects into British territory. An exchange of the two pieces of land is effected. Is it reasonable to suppose that the Governor-General in Council cannot without an Act of Parliament passed for the purpose legislate for the handful of squatters, for whom he could undoubtedly legislate before the exchange?]

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An intention so unreasonable cannot be attributed to Parliament unless it is expressed in unequivocal language.

[EDGE, C.J.—Between the passing of the Indian Councils Act in 1861 and the passing of the 32 and 33 Vic., c. 98, did not legislation by the Governor-General in Council take place for territories acquired during the same period?]

Yes. See Act XIX of 1867, relating to the district of Darjeeling, including a portion conquered in 1864 (1); Act XXII of 1868, for mauza Kheria, ceded by the Maharana of Dholepur in 1866 (2); and Act XVI of 1869 for the Bhutan Duars, acquired by conquest and cession from the Rajas of Bhutan, under treaty dated the 11th November 1865 (3). Many subsequent Acts have dealt with territories acquired since 1861 (4).

All laws and regulations passed by the Governor-General in Council must be laid before both Houses of Parliament: 3 and 4 Wm. IV., c. 85, s. 51; compare 53 Geo. III, c. 155, s. 66. Parliament must be presumed to have knowledge of such laws and regulations; *Empress v. Burah* (5), per Sir Richard Garth, C.J., in the High Court of Calcutta, and Lord Selborne in the Privy Council. It has treated the legislation of the Governor-General in Council for territories acquired subsequently to 1861 as valid, both by leaving such legislation undisturbed, and by using language in the 28 and

(1) Aitchison's Treaties, vol. i, pp. 151, 159, 165; Hunter, vol. iv., pp. 131-132.

(2) Aitchison, vol. iii, p. 183.

(3) Preamble; Aitchison, vol. i, pp. 151-152, 162, 165.

(4) *E.g.*, Acts VIII of 1874 and I of 1882, for the Eastern Duars (part of the Goalpara district), acquired under the treaty of the 11th November 1865, and Shillong (Khasia and Jaintia Hills), acquired by cession on the 10th December 1863; the Scheduled Districts Act (XIV of 1874) for the tract between the railway station at Satna and the eastern boundary of the Jabalpur district, ceded by the Maharaja of Rewah in 1863 (see s. 10, and Aitchison, ii, 410, 427), Little Aden, purchased in 1868, the Bengal Duars, the Nicobar Islands, Shillong, the Eastern Duars, Nong-bah

(in Assam), and Morar Cantonment; The Laws Local Extent Act (XV of 1874); Act IX of 1879 (Nicobar Islands); Acts X of 1880 and XIII of 1883, for lands ceded by the Nawab of Bahawalpur in 1879 and 1882, and annexed to the Multan district; Act XX of 1886 (Upper Burma Laws Act), XV of 1887, and XVIII of 1888 for Upper Burma; Act XV of 1888, for the Shan States.

See also s. 2 (8) of the General Clauses Act, I of 1868 (which was passed prior to the 32 and 33 Vic., c. 98), defining "British India" as "the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vic., c. 106."

(5) I. L. R., 3 Calc., at p. 143; L. R., 3 App. Cas., at p. 907; L. R., 5 I. A., at p. 196; I. L. R., 4 Calc., at p. 183.

29 Vic., c. 17, and 32 and 33 Vic., c. 98, which is only consistent with the supposition that such legislation was not *ultra vires*. [He also referred to the 39 and 40 Geo. III, c. 79, s. 20.]

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[He was then stopped.]

None of the counsel or pleaders appearing in the cases to which the reference applied desired to contend that the Court had not jurisdiction.

The following judgment was delivered by the Full Bench :—

EDGE, C.J., and STRAIGHT, BRODHURST, TYRRELL and MAHMOOD, JJ.—The question raised by the reference in these cases to the Full Bench is whether the town and fort of Jhānsi are subject to the jurisdiction of this Court in the same manner as the rest of the Jhānsi district, or, in other words, whether the Governor-General in Council had power to legislate for the town and fort of Jhānsi and to pass Act XVII of 1886. The question appeared to us of such importance that we considered it advisable to give notice to the Government that it had been raised, as also to afford the Government an opportunity to instruct counsel to assist us to elucidate the question which, in the opinion of the majority of the Court as then advised, was by no means free from doubt and difficulty. With this object the Government instructed Mr. *Arthur Strachey* to appear as *amicus curiæ*, and we think it only right to say that we are very much indebted to him for the great pains with which he prepared himself for the very able argument which he has addressed to us.

By a treaty dated the 12th December 1860, the British Government ceded the town and fort of Jhānsi in full sovereignty to the Maharaja Scindia. The transfer was completed on the 1st April 1861. On the 10th March 1886 the Maharaja Scindia, in exchange for the cantonment of Morar, made over in full sovereignty to the British Government the town and fort of Jhānsi. On the 1st August 1861 the Indian Councils Act, 1861 (24 and 25 Vic., c. 67), received the Royal assent. The difficulty has arisen by reason of the wording of the twenty-second section of that Act which, so far as



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is material, is as follows:—"The Governor-General in Council shall have power of meetings for the purpose of making laws and regulations as aforesaid, and subject to the provisions herein contained, to make laws and regulations for repealing, amending, or altering any laws or regulations whatever now in force or hereafter to be in force in the Indian territories now under the dominion of Her Majesty, and to make laws and regulations for all persons, whether British or native, foreigners or others, and for all Courts of justice whatever, and for all places and things whatever within the said territories, and for all servants of the Government of India within the dominions of Princes or States in alliance with Her Majesty, and the laws and regulations so to be made by the Governor-General in Council shall control and supersede any laws and regulations in anywise repugnant thereto which shall have been made prior thereto by the Governors of the Presidencies of Fort St. George and Bombay respectively in Council, or the Governor or Lieutenant-Governor in Council of any Presidency or other territory for which a Council may be appointed with power to make laws and regulations under and by virtue of this Act," &c.

It was contended that on the true principle of construction as applied to that section, the words "the said territories" in that section were limited by the preceding words "Indian territories now under the dominion of Her Majesty." If it had not been for the subsequent legislation of the Imperial Parliament taken in conjunction with the subsequent legislation of the Governor-General in Council, to which Mr. *Strachey* has drawn our attention and to which we shall refer, we would have felt ourselves constrained to hold that the Governor-General in Council had exceeded his jurisdiction in passing Act XVII of 1886, inasmuch as the town and fort of Jhānsi were not, on the 1st August 1861, an Indian territory or Indian territories under the dominion of Her Majesty.

We have, however, to see whether the Imperial Parliament has not, by its legislation, subsequent to the 1st August 1861, put a wider construction upon s. 22 of the Councils Act, 1861, which excludes the narrower construction of the wording of the section to which

we have referred, and whether the Imperial Parliament has not conferred more extensive legislative powers on the Governor-General in Council than were apparently conferred by s. 22 of the Indian Councils Act, 1861. On the 9th May 1865 the Act 28 and 29 Vic., c. 17, received the Royal assent. There is a recital in the following terms:—"Whereas by an Act passed in the session holden in the twenty-fourth and twenty-fifth years of the reign of Her present Majesty, chapter sixty-seven, it was, among other things, enacted that the Governor-General of India in Council shall have power at meetings for the purpose of making laws and regulations to make laws and regulations for all persons, whether British or native, foreigners or others, within the Indian territories under the dominion of Her Majesty, and for all servants of the Government of India, within the dominions of Princes and States in alliance with Her Majesty; and whereas it is expedient to enlarge the said power by authorizing the Governor-General of India in Council to make laws and regulations for all British subjects of Her Majesty within the dominions of such Princes and States."

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That recital taken in conjunction with the fact, of which we must presume the Imperial Parliament was aware, that in 1864 a portion of the district of Darjeeling had been acquired by conquest and had then first become part of Her Majesty's dominions in India, shows that the Imperial Parliament construed in 1865, s. 22 of the Indian Councils Act as if the words 'the said territories' in that section were not limited to the Indian territories which, on the 1st August 1861, were under the dominion of Her Majesty. On the 11th August 1869 the Act of the Imperial Parliament, 32 and 33 Vic., c. 98, received the Royal assent. In the preamble to that Act it is recited that whereas doubts have arisen as the extent of the power of the Governor-General of India in Council to make laws binding upon native Indian subjects beyond the Indian territories under the dominion of Her Majesty, and whereas it is expedient that better provision should be made in other respects for the exercise of the powers of the Governor-General in Council. That recital in our opinion assumes that no doubts had arisen as to

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the power of the Governor-General in Council to make laws binding upon the native Indian subjects of the Crown within the Indian territories under the dominion of Her Majesty, no matter when such territories had been acquired. By s. 1 of 32 and 33 Vic., c. 98, it was enacted that—"From and after the passing of this Act the Governor-General of India in Council shall have power at meetings for the purpose of making laws and regulations to make laws and regulations for all persons being native Indian subjects of Her Majesty, Her heirs and successors, without and beyond as well as within the Indian territories under the dominion of Her Majesty."

The Imperial Parliament in that section assumed that the Governor-General in Council had power to make laws binding upon the native Indian subjects of the Crown within the Indian territories under the dominion of Her Majesty, and in that sense interpreted s. 22 of the Indian Councils Act, 1861. Such an interpretation is inconsistent with a construction of s. 22 of the Indian Councils Act, 1861, which would limit the powers of the Governor-General in Council to making laws binding upon all persons, whether native Indian subjects or others, within the territories which on the 1st August 1861 were under the dominion of Her Majesty. It could not have been the intention of the Imperial Parliament that, *quoad* the power of the Governor-General in Council to legislate for native Indian subjects within the territories under the dominion of Her Majesty, a different construction should be put upon s. 22 of the Indian Councils Act, 1861 to that which should be put upon that section, *quoad* the power of the Governor-General in Council to legislate for persons other than native Indian subjects within the Indian territories under the dominion of Her Majesty.

Between the 1st August 1861 and the 11th August 1869 not only had territories in India been acquired, but legislation by the Governor-General in Council for such territories had taken place. In 1864 part of the district of Darjeeling had been acquired by conquest, and on the 8th March 1867 Act XIX of 1867, which applied to the district of Darjeeling, including the part of that district which had been acquired by conquest in 1864, was passed

by the Governor-General in Council. In 1866 mauza Kheria had been ceded to the British Government by the Maharana of Dholepur, and on the 10th September 1868 Act XXII of 1868, which related, amongst other things, to the administration of civil and criminal justice in mauza Kheria, was passed by the Governor-General in Council. In 1865 the Bhutan Duars were acquired by conquest and cession, and on the 23rd July 1869, Act XVI of 1869, relating to that territory, was passed by the Governor-General in Council. It was obligatory by statute to lay before both Houses of Parliament copies of all laws and regulations made by the Governor-General in Council. Consequently, prior to the passing by the Imperial Parliament of the 32 and 33 Vic., c. 98, it must be assumed that that obligation had been complied with, at least so far as Act XIX of 1867 and Act XXII of 1868 were concerned. We must presume that Act XIX of 1867 and Act XXII of 1868 "were known to and in the view of the Imperial Parliament" when the 32 and 33 Vic., c. 98, was passed. A similar presumption in respect of the legislation in India prior to the passing of the Indian Councils Act, 1861, was made by Sir Richard Garth, C.J., and subsequently by their Lordships of the Privy Council in the case of *Empress v. Burah* (1). We should not overlook the fact that the Imperial Parliament has not interfered with any of the numerous legislative enactments of the Governor-General in Council which were passed between 1867 and 1886 inclusive, in relation to Indian territories which were not, on the 1st August 1861, under the dominion of Her Majesty, and which, since the 1st August 1861, have been acquired by conquest or cession.

Even if the interpretation which has been put by the Imperial Parliament on s. 22 of the Indian Councils Act, 1861, was erroneous, we are of opinion that that interpretation has been so declared by the Imperial Parliament as to make it obligatory upon us to adopt it in this case. In the case of *The Postmaster-General of the United States v. Early* (2), the Supreme Court of the United

(1) I.L.R., 3 Calc., at p. 143; L.R., 3 App. Cas., at p. 907; L.R., 5 I.A., at p. 196; I.L.R., 4 Calc., at p. 183.

(2) Curtis' Reports of Decisions in the Supreme Court of the United States, p. 89.

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States decided that though a mistaken opinion of the Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. Whether the word "now" was intentionally or by inadvertence introduced into s. 22 of the Indian Councils Act, 1861, it is difficult to say. To hold that the Governor-General in Council has not power to legislate except in respect of Indian territories which were on the 1st August 1861 under the dominion of Her Majesty, would, as has been pointed out by Mr. Strachey, lead to anomalous results which the Imperial Legislature must have foreseen and could not have intended. If we were to construe that section strictly, we would have to hold not only that the Imperial Parliament gave power to the Governor-General in Council to legislate in relation to all Indian territories which were on the 1st August 1861 under the dominion of Her Majesty, irrespective of the question whether at the date of the legislation by the Governor-General in Council such territories had or had not ceased to be under the dominion of Her Majesty, but that a long series of legislative enactments of the Governor-General in Council, although *ultra vires*, had in effect been treated by the Imperial Parliament as *intra vires*.

In the result we are of opinion that the Governor-General in Council had power to pass Act XVII of 1886, and that the town and fort of Jhānsi are subject to the jurisdiction of this Court in the same manner as the rest of the Jhānsi district.

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—————1868—I, s. 6. "*Proceedings commenced*"—*Company—Application for registration—Act X of 1866 (Indian Companies Act)—Application received while Act X of 1866 was in force—Delay in office of Registrar—Certificate purporting to be issued under Act X of 1866, but issued after repeal thereof by Act VI of 1882—Company held to have been registered under Act X of 1866.* Prior to the 1st May 1892, the Secretary and Manager of a projected Company (which was to be limited by shares) applied to the Registrar of Joint-Stock Companies for a certificate of incorporation of the Company, intending that it should be registered under Act X of 1866, the Indian Companies Act then in force, and forwarded the memorandum and articles of association with the necessary stamp-fees, and did everything that was required to be done by or on behalf of the Company to obtain a certificate under that Act. No order was passed by the Registrar upon this application until the 6th May, and owing to delay, for which the applicants were not responsible, registration was not effected and the certificate was not issued until the 3rd July, when a certificate was given purporting to be granted in pursuance of Act X of 1866. Meanwhile, on the 1st May 1882, the Indian Companies Act (VI of 1882) repealing Act X of 1866 came into force, s. 28 of which provided that every share in any company should be deemed to have been taken and held subject to payment of the whole amount thereof in cash, unless the same had been otherwise determined by a contract in writing filed with the Registrar. No such provision existed in Act X of 1866. The shareholders of the Company paid nothing upon their shares in cash; but had agreed (not in writing filed with the Registrar) that, in consideration of certain property conveyed by them to the Company at the time of its formation, fully paid up shares were to be allotted to them. Subsequently the Company having gone into liquidation, the official liquidator sought to make the shareholders contributories to the assets of the Company as the holders of the shares upon which nothing had been paid, with reference to s. 28 of the Indian Companies Act VI of 1882.

*Held*, that the proceedings for obtaining registration of the Company and a grant of a certificate of such registration commenced, within the meaning of s. 6 of the General Clauses Act, when the memorandum and articles of association were received in the Registrar's office in April 1882, while Act X of 1866 was in force; that, therefore, the repeal of that Act by Act VI of 1882 did not affect those proceedings; that consequently the Company must be taken to have been incorporated under the former Act; and that the provisions of s. 28 of Act VI of 1882 not being applicable, the shareholders were not liable to be placed on the list of contributories as not having paid the full amount of their shares.

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ACTS—1870—VII, s. 12. *See* Civil Procedure Code, ss. 2, 54.

\_\_\_\_\_, sch. i, No. 5. *Fee payable on application to review appellate decree under Letters Patent, s. 10.*] For the purpose of ascertaining the court-fee to be paid under sch. i., art. 5 of the Court Fees Act (VII of 1870), upon an application to review an appellate decree, the fee to be considered is the fee leviable on the memorandum of the appeal in which the decree sought to be reviewed was passed, and not the fee which was leviable on the plaint nor—where the decree sought to be reviewed was passed on appeal under s. 10 of the Letters Patent from an appellate judgment of a Division Bench—the fee which was leviable on the memorandum of the appeal before such Bench.

Husaini Begam v. The Collector of Muzaffarnagar . . . . . 182

\_\_\_\_\_, ii, No. 6. *See* Security bond for costs of appeal.

\_\_\_\_\_, X, s. 55. *Part of property acquired for public purposes—Owner desiring that the whole shall be acquired—Right of owner not confined to small or confined areas—Convenience of owner not the test.*] The Local Government having appropriated, for public purposes under the Land Acquisition Act (X of 1870), some of the out-houses attached to a dwelling-house and part of the compound in which they were situate, without taking the house with its other out-houses or appurtenances or the rest of the compound, the owner objected, under s. 55 of the Act, that the Government should take the whole of such property or none.

*Held*, applying to s. 55 the interpretation placed by the courts in England upon the corresponding s. 92 of the Land Clauses Consolidation Act (8 & 9 Vic., c. 18), that the section was applicable and the objection must be allowed. *Grosvenor v. The Hampstead Junction Railway Company, Cole v. The West London Crystal Palace Railway Company, and King v. the Wycombe Railway Company* referred to.

*Held* also, that the rule was not in England restricted to small or confined areas, and that the test was not whether the part appropriated could be severed from the rest of the property without inconvenience to the owner.

Khairati Lal v. The Secretary of State for India in Council. . . . . 378

\_\_\_\_\_, 1871—VIII, ss. 28, 64, 65 and 66. *Place of registration of documents.*] The requirements of s. 28 of Act VIII of 1871 are fulfilled by the registration of a document relating to immovable property in the office of the Sub-Registrar within whose sub-district any portion of the property is situate. The words “some portion of the property” are not to be read as meaning some substantial portion of the property. All matters of publicity, which it is the object of a register to afford, are provided for in this respect by the carrying out of the provisions of ss. 64, 65 and 66.

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ACTS—1872—I, s. 110. *See* Mortgage.

\_\_\_\_\_, s. 115. *See* Mortgage, usufructuary.

\_\_\_\_\_, s. 118. *Witnesses—Competency of persons of tender years.*] The competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation, and is a question distinct from that of his credibility when he has been sworn or has affirmed. In determining the question of competency, the Court, under s. 118 of the Evidence Act, has not to enter into inquiries as to the witness' religious belief, or as to his knowledge of the consequences of falsehood in this world or the next. It has to ascertain, in the best way it can, whether, from the extent of his intellectual capacity and understanding, he is able to give a rational account of what he has seen or heard or done on a particular occasion. If a



person of tender years or of very advanced age can satisfy these requirements, his competency as a witness is established.

Queen-Empress v. Lal Sahai . . . . . 183

IX, s. 23. *Agreement opposed to public policy.*] For the purpose of meeting the expenses of an appeal to the Privy Council from concurrent decrees of the Subordinate Judge and the High Court, the plaintiff-appellant executed a deed of sale of certain property worth over Rs. 50,000 in consideration of the vendees providing the necessary security and moneys. The plaintiff experienced considerable difficulty in procuring the means to appeal. The vendees were not professional money-lenders, they did not put pressure on the plaintiff, but, on the contrary, he and his agent put pressure on them to agree to the terms of the deed. It appeared that, apart from the monies borrowed by him from time to time, he was without even the means of subsistence; that he fully understood the nature of the deed; that his agents negotiated the transaction *bonâ fide* and, to the best of their powers, in his interest; that there was no fraud or deception on the part of the vendees; and that they performed all that they undertook as regards meeting the expenses of the appeal. Under the deed the plaintiff's were liable to furnish security to the extent of Rs. 4,000 and to advance Rs. 8,500 for other necessary expenses, and they did in fact furnish such security and advanced sums aggregating Rs. 7,542. The appeal was successful. The appellant having failed to put the vendees in possession of the property conveyed by the deed, and recovered by him under the Privy Council's decree, the vendees sued him for possession of the property and mesne profits, afterwards agreeing that the Court should, in lieu thereof, award them compensation in money equivalent thereto.

*Held* that, although the case was very different from cases in which persons interfered for their own benefit in litigation not their own, or in which mukhtars, vakils or persons of that class or professional money-lenders, taking advantage of the borrower's position, sued to enforce a contract obtained by them from him, and although the defendant was not entitled to sympathy, yet, judging by the disproportion between the liability incurred by the plaintiffs under the contract and the reward which they were to obtain in the event of the defendant's success, it must be concluded either that they did not believe his claim to be well founded, and consequently entered, though unwillingly, into a gambling transaction, or, if they believed the claim to be well founded, that the reward contracted for was excessive and unconscionable; and in either case the contract could not be enforced in its terms.

*Held*, that, if the doctrine of equity applicable to such cases were applied in favour of the borrower, it should also be applied in favour of the lender; that as there was no reason to suspect the plaintiff's motives, it would be inequitable to relieve the defendant from all liability; that it was only fair that he should compensate the plaintiffs for the use of their security bonds from the date when they were deposited in the High Court to the earliest date after the judgment of the Privy Council, when the plaintiffs could have obtained them back; that simple interest at 12 per cent. per annum on the amounts of the bonds for that period would be reasonable compensation for such use; that the defendant should also repay the amounts advanced by the plaintiffs for the expenses of the litigation with interest on each advance at 20 per cent. from the date on which it was made to the date of the decree in the present case; and that he should pay interest on the whole amount thus decreed at 6 per cent. from the date of the decree till payment.

*Chunni Kuar v. Rup Singh, Raja Sahib Prahlad Sen v. Baboo Budh Singh and Bowes v. Heaps* referred to.

Loke Indar Singh v. Rup Singh . . . . . 118

**ACTS—1872—IX, s. 23.** *Agreement opposed to public policy.*] For the purpose of meeting the expenses of a suit for possession of immovable property, the plaintiff, who was in straitened circumstances, agreed with the defendant that the latter, in consideration of paying such expenses from the Court of first instance up to the High Court, should have half the property and half the mesne profits, with all his costs, in the event of success. The suit was brought and was conducted by the plaintiff and the defendant jointly, and was decreed by the High Court on appeal, and the defendant obtained possession of half the property. The plaintiff sued to recover possession of the half, on the ground that the agreement was illegal and void. It appeared that the amount actually spent by the defendant in the former litigation was Rs. 368, and that if that suit had failed, he would have lost about Rs. 600. It was found that the value of the half share of the property was about Rs. 1,000.

*Held*, that the agreement was unfair, unreasonable, extortionate and contrary to public policy, within the meaning of s. 23 of the Contract Act (IX of 1872), and that the plaintiff was entitled to recover possession of the land in suit on payment of compensation for the advances made by the defendant in the former litigation, with interest at 12 per cent. per annum. *Chunni Kuar v. Rup Singh and Loke Indar Singh v. Rup Singh* referred to

*Husain Bakhsh v. Rahmat Husain* . . . . . 128

—————, s. 23. *See* Maintenance.

—————, s. 65. *See* Act XV of 1877, sch. ii, Nos. 64, 97.

—————, ss. 69, 70. "*Lawfully*"—*Mortgage—Decree enforcing hypothecation—Satisfaction of decree by person not subject to legal obligation thereunder—Suit for contribution brought by such person against judgment-debtors—Gratuitous payment.*] The widow of *D*, a separated Hindu, hypothecated certain immoveable property which had belonged to her husband. The immediate reversioners to *D*'s estate were his nephew *S* and the three sons of his brother *O*. After the widow's death, the mortgagee put his bond in suit, impleading as defendants *S*, two of *S*'s four sons, and the three sons of *O*. Only the three last-mentioned persons resisted the suit; and the mortgagee obtained a decree directing the sale of the mortgaged property in satisfaction of his claim. From the operation of this decree *S* was wholly exempted, and his sons were made liable only to pay their own costs. Before any sale in execution of the decree could take place, the sons of *S* paid the amount of the decree into Court, thus saving the property from sale. They subsequently sued the sons of *O* for contribution in respect of this payment. It was found that, at the time when the payment was made, *S* was a member of a joint Hindu family with the defendants, and that his sons, the plaintiffs, had, at that time, no interest in the property by transfer from him.

*Held*, that at the time of the payment, the plaintiffs could not properly be regarded as in the position of co-mortgagors with the defendants, so as to have an equitable lien upon the property they had saved from sale; that it was not a case of a payment which the defendants were bound to make in which the plaintiffs were "interested" within the meaning of s. 69 of the Contract Act; and that therefore the fiction of an implied request by the defendants to the plaintiff to make payment could not be imported into the case and the plaintiffs were not entitled to contribution.

*Held* also, that there was no such relationship between the parties as would create or justify the inference of any right in the plaintiffs to look to the defendants for compensation, so as to make s. 70 of the Contract Act applicable; and that if the plaintiffs, as mere volunteers, chose to pay the money, not for the defendants, but for themselves, they could not claim the benefits of that section.

The principle of the decision in *Pancham Singh v. Ali Ahmad* has been recognised and provided for in the Transfer of Property Act.

By the use of the word "lawfully" in s. 70 of the Contract Act, the Legislature had in contemplation cases in which a person held such a relation to another as either directly to create or reasonably to justify the inference that by some act done for another person, the person doing the act was entitled to look for compensation to the person for whom it was done. *Ram Tulal Singh v. Bissessar Lal Sahoo* referred to.

*Chedi Lal v. Bhagwan Das* . . . . . 234

ACTS—1872—IX, ss. 134, 137. *Omission by creditor to sue principal debtor within period of limitation—Discharge of surety.*] The omission of a creditor to sue his principal debtor within the period of limitation discharges the surety under s. 134 of the Contract Act (IX of 1872), even though the non-suing within such period arose from the creditor's forbearance.

Section 137 of the Contract Act does not limit the effect of s. 134. Its object is to explain and prevent misconception as to the meaning of s. 135. It applies only to a forbearance during the time that the creditor can be said to be forbearing to exercise a right which is still in existence.

*Hajarimal v. Krishnaraw* and *Krishto Kishori Chowdhraim v. Radha Romun Munshi* dissented from. *Hazari v. Chunni Lal* referred to.

*Radha v. Kinlock* . . . . . 310

—1873—X, ss. 6, 13. *Omission to take evidence on oath or affirmation.*] Having regard to the language of the Oaths Act (X of 1873) a Court has no option, when once it has elected to take the statements of a person as evidence, but to administer to such person either an oath or affirmation as the case may require. *Queen-Empress v. Maru* referred to.

In a trial for murder before the Court of Session, one of the witnesses was a boy of twelve years of age, and, in answer to questions put by the Sessions Judge, he said that he worshipped Debi and understood the difference between truth and falsehood, that he did not know what would be the consequences here or hereafter of telling lies, but that he would tell the truth. The Sessions Judge proceeded to record the boy's statement, but without administering to him any oath or affirmation.

*Held*, that there was nothing in the law to sanction this procedure on the part of the Judge.

The High Court required the attendance of the boy and of the accused, and, having satisfied itself of the competency of the former to depose as a witness, examined him as to his account of what had occurred.

*Queen-Empress v. Lal Sahai* . . . . . 183

ACTS—1873—XIX, ss. 94, 97. *Assent to and validity of mutation of names in the collectorate record of rights.*] The question was, according to the judgment of the High Court, whether a change of names in the collectorate record of rights represented a *bona fide* transfer by the plaintiff, or whether there was a mere assent by her to a paper transaction, relating to the ownership of a share in a village, in giving which assent she had not acted freely, but under undue influence. Reversing the decision of the High Court, which was that the plaintiff had assented to the proceedings under intimidation, their Lordships held that, on the evidence, no intimidation had been proved, and that a suit to cancel this "dakhil kharij" and for a declaration of the proprietary right of the plaintiff, in whose name the village stood before the mutation had been rightly dismissed in the first Court.

*Har Lal v. Sardar* . . . . . 399

—s. 113. *Question of title—Appeal from order under first part of s. 113.*] No appeal lies to the High Court from a decision of a Collector or

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Assistant Collector under the first part of s. 113 of the North-Western Provinces Land Revenue Act (XIX of 1873), declining to grant an application for partition until the question in dispute has been determined by a competent Court.

Imtiaz Bano v. Latafat-un-nissa . . . . . 328

ACTS—1877—I, s. 42. See Act XII of 1881 (N.-W. P. Rent Act), s. 106, and Hindu widow.

III, ss. 49, 60. *Certificate of registration—Distinction between act of registering officer and conduct of parties—Certificate not invalidated and document not made inadmissible by erroneous procedure in presenting or admitting execution.* The word “registered” as used in s. 49 of the Registration Act (III of 1877) refers to the act of registration by the registering officer, and not to matters of procedure or conduct of the parties seeking registration, which are governed by special provisions of the Act. S. 49, read with s. 60, only means that a document to be admissible in evidence for the purposes of the former section must be registered, i.e., the officer must, under s. 60, have put upon it the certificate required by that provision. If he has done so, the document bearing such certificate becomes admissible in evidence: if he has not, or there has been no registration of the document, then such document is inadmissible. Where the document bears such a certificate, it is registered within the meaning of s. 60 and becomes under the second paragraph thereof admissible in evidence, and the operation of the second paragraph is not interfered with by s. 49.

Where, therefore, the Lower Appellate Court rejected as inadmissible in evidence under s. 49 a deed of gift of immoveable property upon which was endorsed a certificate under s. 60, on the ground that the person presenting it for registration and admitting execution was not qualified to do so under ss. 32 and 35, and the registration was consequently void and the document not registered under s. 17 (a).—*Held* that the Court was wrong in so doing and ought to have looked at and dealt with the document.

*Har Sahai v. Chunni Kuar, Ikkal Begam v. Sham Sundar, Bishunath Naik v. Kalliani Bai, Husaini Begam v. Mulo, Sheo Shunkar Sahoy v. Hirdey Narain Sahu, Muhammad Ewas v. Birj Lal, Sah Mukhun Lal Pandey v. Sah Koondu Lal, Majid Hosain v. Faal-un-nissa*, referred to.

Hardei v. Ram Lal . . . . . 319

XV, s. 28. See Mortgage.

SCH. II, Nos. 64, 97. Act IX of 1872 (*Contract Act*), s. 65.] Money due on an account stated which would, as such, have been barred in three years from the statement, under Act XV of 1877, sch. II, art. 64, becomes, for purposes of limitation, a debt of another character, when, it having been the subject of an arrangement whereby it was to be retained by the debtor as part of the consideration upon a proposed sale of land, that arrangement failed, the sale not being specifically enforceable, and so declared by decree.

In contemplation of a sale of land by the debtor to the creditor, it was agreed that the book debt should be retained by the former in satisfaction of part of the price, but the parties failing to agree as to certain other terms, a suit brought by the intending vendor for specific performance was dismissed on the ground that no effectual agreement had been made.

*Held*, that this decree brought about a new state of things and imposed a new obligation on the debtor, who could no longer allege that he was absolved by the creditors being entitled to the land instead of the money. He became bound to pay that which he had retained in payment of his land, the date of the decree giving the date of the failure of an existing consideration, within the meaning of art. 97.

The matter might also be regarded as falling under s. 65 of the Contract Act, IX of 1872, under which, when the agreement was decreed ineffectual, the debtor, having previously received an advantage under it, was made liable "to restore" that advantage or "to make compensation for it."

*Bassu Kuar v. Dhum Singh* . . . . .

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**ACTS—1877—XV, s. 91, 144.** *Muhammadian Law—Inheritance—Gift—Suit by heir for share of donor's property by declaration of invalidity of gift.* A Muhammadian who, in October 1875, executed a deed of gift of his property, under which possession was taken by the donees, died in June 1885, never having taken any steps to have the deed of gift set aside. In February 1886, a suit was brought by his nephew, claiming a share in the donor's estate by right of inheritance, and by having it declared that the deed was procured from the donor by fraud and undue influence. It was found that the plaintiff was aware of the existence of the deed soon after its execution, and that if there were any facts entitling him to have it cancelled, those facts were known to him more than three years before the institution of the suit.

*Held*, that the plaintiff had, during the donor's lifetime, no reversionary or vested interest in the estate, but a mere possibility of inheritance, and consequently the donor, when he executed the deed, had full disposing power over his property, and the right which, at his death, accrued to the plaintiff came to the latter affected by the donor's acts and dispositions; and that as a suit by the donor to set aside the deed would, at the time of his death, be barred by art. 91 of the Limitation Act (XV of 1877), such a suit was also barred against the plaintiff who claimed through him, the cancelment of the deed being a substantial and necessary incident of the claim, and the necessity which rested upon the plaintiff for obtaining such cancelment before he could dislodge the donees not being obviated by his choosing to call the suit one for possession of immoveable property. *Abdul Wahid Khan v. Nuran Bibee and Jagadamba Chaudhrain v. Dakkhina Mohun* referred to.

*Hasan Ali v. Nazo* . . . . .

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\_\_\_\_\_, sch. ii, No. 113. *See* Suit for specific performance.

\_\_\_\_\_, 116. *See* Bond.

\_\_\_\_\_, Nos. 144, 148. *See* Mortgage.

\_\_\_\_\_, No. 175C. *See* Civil Procedure Code, ss. 368, 562.

\_\_\_\_\_, 178. *See* Civil Procedure Code, s. 315.

\_\_\_\_\_, 1879—I, sch. i, No. 13. *See* Security bond for costs of appeal.

\_\_\_\_\_, 1881—XII, s. 93 (A). *See* s. 106.

\_\_\_\_\_, s. 106. *Jurisdiction—Civil and Revenue Courts—Suit by co-sharers in a joint undivided mahál for declaration of title by co-sharers defendants—Suit not maintainable—Act XII of 1881 (North-Western Provinces Rent Act), s. 148—Act I of 1877 (Specific Relief Act), s. 42—Civil Procedure Code, s. 11.]* The effect and intention of the proviso to s. 148 of the North-Western Provinces Rent Act (XII of 1881) is to preserve the jurisdiction of the Civil Courts under s. 42 of the Specific Relief Act (I of 1877), while prescribing a special period of one year's limitation for such suits when they arise out of adjudications such as s. 148 contemplates. Neither that section nor the proviso affects the jurisdiction of a Civil Court to entertain a suit by some of a body of co-sharers in a joint and undivided mahál for a declaration of their title to receive a proportionate share of the rent payable by the tenants.

Having regard to s. 11 of the Civil Procedure Code, a suit for the recovery of certain sums of money as the plaintiffs' share of rent alleged by them to have been wrongfully received by the defendants, their co-sharers, and in

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which the plaintiffs' right to receive any portion of the rent claimed is denied by the defendants, is not barred from the cognizance of the Civil Courts by s. 93 (A) of the North-Western Provinces Rent Act. That provision does not contemplate suits in which such claims of title are so made and resisted.

But a suit by some of the co-sharers in a joint and undivided mahál for such declaration and such recovery of a proportionate share of rent as above referred to is barred by the provisions of s. 106 of the North-Western Provinces Rent Act, in the absence of proof of local custom or special contract authorizing such suits.

Mahadeo Singh v. Bachu Singh . . . . . 224

ACTS—1881—XII, s. 148. *See* s. 106.

\_\_\_\_\_, s. 208. *Jurisdiction—Remand.*] An Assistant Collector dismissed a suit without considering the merits, on the ground that it was not cognizable by a Revenue Court. On appeal the District Judge held that it was unnecessary to determine the question of jurisdiction as he had power in any event under s. 208 of the N.-W. P. Rent Act to remand the suit to the Assistant Collector, and he remanded it accordingly.

*Held*, that the Judge had rightly construed s. 208 of the Rent Act and that the remand was proper. *Ahmad-ud-din Khan v. Majlis Rai* distinguished.

Girwar Singh v. Sita Ram . . . . . 31

———1882—IV, s. 54. *See* Vendor and purchaser.

\_\_\_\_\_, s. 67 (a). *See* Mortgage, usufructuary (2).

\_\_\_\_\_, ss. 88, 89, 90. *Decree for sale of mortgaged property—Decree not satisfied by sale—Recovery of balance due on mortgage.*] The decree contemplated by s. 90 of the Transfer of Property Act (IV of 1882) can be made in the suit in which the decree for sale was passed; and it is not necessary to institute a fresh suit to obtain such decree.

Raj Singh v. Parmanand . . . . . 480

\_\_\_\_\_, s. 93. *See* Mortgage, usufructuary (1).

———1886—XVII. *See* Statute 24 and 25 Vic., c. 67, s. 22.

———1888—VII, ss. 53, 66. *See* Civil Procedure Code, ss. 368, 582.

ADMISSION. *See* Question in issue.

AGREEMENT OPPOSED TO PUBLIC POLICY, *See* Act IX of 1872, s. 23 and Maintenance.

APPEAL—*Abatement*—*See* Civil Procedure Code, ss. 368, 582.

\_\_\_\_—SECOND. *See* Civil Procedure Code, ss. 584, 629.

BOND. *Interest post diem—Damages for non-payment on due date—Limitation—Act XV of 1877 (Limitation Act), sch. ii, No. 116—Charge on hypothecated property—Successive or containing breaches of contract.*] A contract to pay interest *post diem* on a mortgage ought not to be implied when the parties to the written contract have not expressed therein any such intention. This is particularly the case where the written contract does in clear terms provide for the payment of interest and compound interest during the term of the mortgage. *Narain Lal v. Chagmal Das* followed. *Chhab Nath v. Kamta Prasad* and *Baldeo Panday v. Gokal Rai* referred to.

Damages given after the due date of a mortgage for non-payment of the principal money upon the due date are damages for breach of contract and not interest payable in performance of a contract; and under art. 116, sch. ii, of the Limitation Act (XV of 1877) a suit to recover such damages must be brought within six years from the time when the contract for the breach of

which they are claimed was broken. It cannot be said that such damages are, from the date when the contract was broken, and even before they have been ascertained or decreed, a charge upon the property hypothecated, so as to make art. 116 inapplicable. *Price v. The Great Western Railway Co.*, *Morgan v. Jones*, *Gordillo v. Weguelin*, *In re Kerr's Policy*, *Lippard v. Ricketts*, *Cook v. Fowler*, and *Bishen Dyal v. Udit Narayan* distinguished.

In such cases there is one breach of the contract, namely, the non-payment on the date agreed upon, and there is no question of continuing or successive breaches. *Mansab Ali v. Gulab Chand* referred to.

*Bhagwant Singh v. Daryao Singh* . . . . . 416

#### BURDEN OF PROOF. *See* Mortgage.

**CIVIL PROCEDURE CODE**, ss. 2, 54. *Dismissal of suit for insufficient court-fee on plaint—Decree—Appeal—Civil Procedure Code, s. 158—Act VII of 1870, s. 12.*] The Court of first instance being of opinion that the plaint bore an insufficient court-fee and the plaintiff not making good the deficiency dismissed the suit after recording evidence, but without entering into the merits. On appeal the Lower Appellate Court held that the court-fee was sufficient and remanded the case for trial on the merits.

*Held*, that s. 158 of the Civil Procedure Code was not applicable to the case, that the first Court's disposal of the suit must be treated as being under s. 54, and was, therefore, a decree within the meaning of s. 2, and appealable as such, and that such appeal was not prohibited by s. 12 of the Court Fees Act. *Ajoodhya Pershad v. Gunga Pershad* and *Annamalai Chetti v. Cloete* referred to.

*Muhammad Sadik v. Muhammad Jan* . . . . . 91

\_\_\_\_\_, s. 11. *See* Act, XII of 1881, s. 106.

\_\_\_\_\_, s. 12. *Pending suits—Malikana—Different reliefs claimed.*] The pendency of litigation regarding rent, *malikana*, or other demand for one year does not, under s. 12 of the Civil Procedure Code, bar a suit between the same parties in which the same demand is made for a subsequent year, inasmuch as the reliefs claimed in the two cases are different. Ss. 12 and 13 of the Code compared.

On the 17th August 1885, a suit was instituted for recovery of an annual *malikana* allowance for the years 1290, 1291 and 1292 fasli. On the 5th October 1885, the Munsif dismissed the suit. On the 10th March 1886, the Subordinate Judge on appeal reversed the Munsif's decree and decreed the suit. On the 21st June 1886, the defendant appealed to the High Court, which, on the 4th July 1887, reversed the Subordinate Judge's decree and restored that of the Munsif, on the ground that the plaintiff had never received and was not entitled to *malikana*. Meanwhile, on the 8th June 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 fasli, which accrued after the institution of the former suit. By judgments dated respectively the 21st August and 27th November 1886, the Lower Courts decreed this suit, holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, operated as *res judicata*, and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May 1887 the defendant appealed to the High Court, and on the 16th May 1888 (the High Court having, in the interval, dismissed the former suit by its judgment of the 4th July 1887) the appeal came on for hearing.

*Held*, that the trial of the present suit by either of the Lower Courts was not barred by s. 12 of the Civil Procedure Code by reason of the fact that, at the time of such trial in August and November 1886 the previous litigation between the parties was pending in second appeal before the High Court.

*Balkishan v. Kishan Lal* . . . . . 148

**CIVIL PROCEDURE CODE, s. 13.** *Malikana—Recurring liability—Res judicata—Different subject-matters claimed—Judgment in first suit going to root of plaintiff's title—"Final" judgment—Judgment liable to appeal or under appeal—Effect of final decree in first suit pronounced subsequent to decision in second suit of Lower Appellate Court, but before hearing of second appeal in second suit.* For the purposes of the rule of *res judicata* it is not essential that the subject-matters of the present and the former litigations should be identical. Where a recurring liability is the subject of claim, a previous judgment dismissing a suit between the same parties upon findings which do not go to the root of the title on which the claim rests, but relate merely to a particular item or instalment, cannot operate as *res judicata*. But if such previous judgment negatives the title and main obligation itself, the plaintiff cannot re-agitate the same question of title by claiming a subsequent item or instalment. *The Rajah of Pittapur v. Sri Rajah Rau Buchi Sittaya Garu* referred to.

A judgment liable to appeal or under appeal is only a provisional and not a definitive or final adjudication, and cannot operate as *res judicata* during the interval preceding the appeal or the interval preceding the decision of the appeal. Explanation IV of s. 13 of the Civil Procedure Code commented on. *Sri Raja Kakalapudi Sanyanarayana v. Chellamkuri Chellamma and Nilvaru v. Nilvaru* referred to.

The rule of *res judicata*, contained in s. 13 of the Code, applies equally to appeals and miscellaneous proceedings as to original suits. Having regard to its main object, so far as it relates to the re-trial of an issue, it refers not to the date of the commencement of the litigation, but to the date when the Judge is called upon to decide the issue. Where, after the commencement of the trial of an issue, a final judgment upon the same issue in another case is pronounced by a competent Court (the identity of parties and other conditions of s. 13 being fulfilled), such judgment operates as *res judicata* upon the decision, original or appellate, of the issue in the later litigation.

On the 17th August 1885, a suit was instituted for recovery of an annual *malikana* allowance for the years 1290, 1291 and 1292 fasli. On the 6th October 1885, the Munsif dismissed the suit. On the 10th March 1886, the Subordinate Judge on appeal reversed the Munsif's decree and decreed the suit. On the 21st June 1886, the defendant appealed to the High Court, which, on the 4th July 1887, reversed the Subordinate Judge's decree and restored that of the Munsif, on the ground that the plaintiff had never received and was not entitled to *malikana*. Meanwhile, on the 8th June 1886, the plaintiff brought another suit against the defendant for recovery of *malikana* for the year 1293 fasli, which accrued after the institution of the former suit. By judgments dated respectively the 21st August and 27th November 1886, the Lower Courts decreed this suit, holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, operated as *res judicata* and was conclusive in favour of the plaintiff's title to the *malikana*. On the 17th May 1887, the defendant appealed to the High Court and on the 16th May 1888 (the High Court having, in the interval, dismissed the former suit by its judgment of the 4th July 1887) the appeal came on for hearing.

*Held*, that the Lower Courts were wrong in holding that the Subordinate Judge's decree of the 10th March 1886, in the former suit, which, at the date of the institution of the present suit on the 8th June 1886, was liable to appeal, and, at the dates of the decisions of those courts in August and November 1886, was the subject of a second appeal pending in the High Court, could operate as *res judicata* in favour of the plaintiff's title to *malikana*.

(ii) That the High Court's judgment dismissing the former suit on the 4th July 1887, though passed after the decisions of the lower Courts in the present suit and after the institution of the second appeal in the present suit, was nevertheless binding on the High Court in deciding such second appeal, and



being final, was conclusive as *res judicata* against the plaintiff's title to *malikana*.

(iii) That the effect of the High Court's judgment dismissing the former suit on the 4th July 1887 was not affected by the circumstance that the second suit was brought for recovery of *malikana* for a different year, inasmuch as that judgment went to the root of the plaintiff's title to *malikana*, and its scope was not limited to the particular item then claimed.

Balkishan v. Kishan Lal . . . . . 148

**CIVIL PROCEDURE CODE, ss. 13, 373—Dismissal of suit—Decree containing clause stating that a fresh suit might be instituted as to a part of the subject-matter—*Res judicata*.]** A suit for possession of immovable property was wholly dismissed, on the ground that the plaintiff had not made out his title to the whole of the property claimed, though he had proved title to a one-third share of such property. The decree included an order in these terms:—“This order will not prevent the plaintiff from instituting a suit for possession of the one-third interest of Musammât Lachminia in the fields specified in the deed of sale,” upon which the suit was based. No appeal was preferred from this decree. Subsequently the plaintiff brought another suit upon the same title to recover possession of the one-third share referred to in the order just quoted.

*Held* by the Full Bench, that the Court in the former suit had no power to include in its decree of dismissal any such reservation or order; that the fact that the decree was not appealed against did not give the order contained in it, which was an absolute nullity, any effect; that as in the former suit the plaintiff could have obtained a decree for the one-third share now claimed, and the whole of the claim in that suit was dismissed, the decree in that suit was a decision within s. 13 of the Civil Procedure Code; and the present suit was consequently barred as *res judicata*. *Kudrat v. Dinu, Ganesh Bai v. Kalka Prasad, Salig Ram Pathak v. Tirbhawan Pathak and Muhammad Salim v. Nabian Bibi* explained.

Sukh Lal v. Bhikhi . . . . . 187

\_\_\_\_\_, s. 13. *See* Mortgage, usufructuary (1).  
 \_\_\_\_\_, ss. 28, 45. *See* Misjoinder of causes of action.  
 \_\_\_\_\_, s. 30. *See* Trust.  
 \_\_\_\_\_, s. 50. *See* Mortgage.  
 \_\_\_\_\_, s. 158. *See* Civil Procedure Code, ss. 2, 54.  
 \_\_\_\_\_, ss. 206, 579. *See* Decree, amendment of.

\_\_\_\_\_, s. 214. *Pre-emption—Conditional decree—Deposit of purchase-money—Appeal—Computation of time allowed for payment.*] In a suit for pre-emption, the decree of the Court of first instance was conditional upon payment of the purchase-money within one month from its date. After this period had expired without payment, the defendants appealed from the decree. The appeal was dismissed and the decree affirmed, and no fresh period for payment was expressly allowed by the decree of the appellate Court.

*Held*, that the decree of the appellate Court must be taken to have incorporated the terms of the decree of the Court of first instance, that the period of one month allowed for payment of the purchase-money must be calculated from the date of the appellate Court's decree, and that payment by the decree-holder within one month from that date was in time. *Shohrat Singh v. Bridgman, Luchman Persad Singh v. Kishun Persad Singh, Gobardhan Das v. Gopal Ram, Noor Ali Chowdhuri v. Koni Meah and Daulat v. Bhukandas Manekchand* referred to.

Rup Chand v. Shamsh-ul-Jehan . . . . . 346

**CIVIL PROCEDURE CODE, ss. 244, 283.** *Decree against mortgagor for mortgage money and directing sale of mortgaged property as against him and a third party—Attachment of other property in possession of third party as that of the mortgagor—Claim by third party to ownership of such property—Suit by decree-holder to establish mortgagor's right to property.*] In a suit upon a hypothecation bond a third party was made defendant, as she claimed the hypothecated property. The mortgagee obtained a decree for recovery of the amount of the bond, and for enforcement of the mortgage. In execution of the decree, the debt not being satisfied by sale of the mortgaged property, the decree-holder caused certain other immovable property in the possession of the third party to be attached. She objected to the attachment on the ground that this property was her own, and was not liable to sale in execution of the decree. The objection was allowed, and the decree-holder then sued for a declaration that the property belonged to the mortgagor judgment-debtor and was liable to attachment and sale in execution of the decree.

*Held*, that as no claim in the former suit was made against the objector personally or in a representative character, but, as regards her, the only claim was virtually for a declaration that she was not entitled to the hypothecated property, the decree affected her only so far as it negatived her alleged interest in that property, and, so far as it was sought to be enforced against other property, she was a stranger to that suit, and her objection must be taken to have been decided under ss. 278 and 280 of the Civil Procedure Code, and the present suit was rightly brought under s. 283 and was not barred by s. 244. *Kameshwar Pershad v. Run Bahadur Singh* referred to: *Mulmantri v. Ashfaq Ahmad* and *Nimba Harishet v. Sitaram Paraji* distinguished.

*Jangi Nath v. Phundo* . . . . .

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—, s. 267A. *See* ss. 375, 647.

—, ss. 290, 311. *Sale of immovable property in execution of decree—Sale held before expiration of thirty days from the proclamation—Application by judgment-debtor to set aside sale—"Illegality"—Material irregularity—Proof of substantial injury, whether necessary.*] Where a sale of immovable property in the execution of a decree took place before the expiration of the thirty days required by s. 290 of the Civil Procedure Code, and without the consent of the judgment-debtor,—*held*, by EDGE, C.J. (BRODHURST, J., dissenting) that the holding of the sale under these circumstances was not merely an irregularity within the meaning of s. 311 of the Code, but was an illegality, and that it was open to the judgment-debtor to object to the sale and to apply to have it set aside, on the ground of such illegality, without proving that he had sustained any substantial injury.

*Held* by BRODHURST, J., *contra*, that infringement of the rule contained in s. 290 of the Code does not of itself vitiate a sale in execution of decree, but is a "material irregularity" within the meaning of s. 311—that expression being wide enough to include illegalities—and that before such a sale can be set aside, the judgment-debtor must prove that he has sustained substantial injury by reason of such irregularity.

*Olpherts v. Mahabir. Pershad Singh, Mohunt Megh Lall Pooree v. Shih Pershad Madi, Kalytara Chowdhraini v. Ramcoomar Gupta, Tripura Sundari v. Durga Churn Pal, Bonomali Mozumdar v. Woomesh Chunder Bundopadhyia, Bandy Ali v. Madhub Chunder Nag, Nathu v. Harbhuj, Jasoda v. Mathura Das and Bakhshi Nand Kishore v. Malak Chand*, referred to.

*Ganga Prasad v. Jag Lal Rai* . . . . .

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—, ss. 311, 313, 320, 322B, 322C, 322D. *See* Execution of decree.

CIVIL PROCEDURE CODE, s. 315. *Limitation—Execution of decree—Sale in execution set aside—Application by purchaser for refund of purchase-money—Accrual of right to apply—Act XV of 1877 (Limitation Act), sch. ii, No. 178.*] A suit by a judgment-debtor, whose *sir* land had been sold in execution of a decree to have the sale declared void and illegal, on the ground that the *sir* was incapable of sale, was decreed on appeal by the High Court on the 13th June 1884. On the 11th June 1887, the purchaser at the sale applied, under s. 315 of the Civil Procedure Code, for a refund of the purchase-money.

*Held*, that the limitation applicable was that provided by art. 178 of sch. ii of the Limitation Act (XV of 1877); that the right to apply accrued on the passing of the High Court's decree, and the application was, therefore, not barred by limitation; but that looking to the great delay there had been on the part of the applicant, he should not be allowed any costs.

Girdhari v. Sital Prasad . . . . . 373

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, s. 361. *See Practice.*

, ss. 368, 582. *Appeal—Abatement—Death of plaintiff-respondent—Application by defendants-appellants for substitution—Application presented after the 1st July 1888—Limitation—Civil Procedure Code, Amendment Act (VII of 1888), ss. 58, 66—Act XV of 1897 (Limitation Act), sch. ii, No. 176C.*] The plaintiff-respondent in an appeal pending before the High Court died on the 17th September 1885. Subsequently *D* applied to the High Court to be brought on the record as legal representative of the deceased. On the 16th April 1886, he was referred to a regular suit to establish his title as such representative, and on the 26th February 1887, such suit was dismissed. On the 8th February 1886, the defendants-appellants applied to the High Court for judgment; but the application was dismissed under the decision of the Full Bench in *Chajmal Das v. Jagdamba Prasad*. On 24th July 1888, they applied to the High Court to bring certain persons upon the record as the legal representatives of the deceased plaintiff-respondent.

*Held*, that the application having been made subsequent to the 1st July 1888, when the Civil Procedure Code Amendment Act (VII of 1888) came into force, and being an entirely fresh application not in continuation of any former proceedings between the same parties, must be dealt with under that Act and not under the Civil Procedure Code, as it stood before the amendment; and that as it was made more than six months after the death of the deceased plaintiff-respondent, the appeal abated, with reference to s. 368 of the Code and art. 176C of the Limitation Act (XV of 1877).

*Held also*, that the petitioners had not shown "sufficient cause" within the meaning of s. 368 of the Code for not making the application within the prescribed period. *Ram Jiwan Mal v. Chand Mal* referred to.

Chajmal Das v. Jagdamba Prasad . . . . . 408

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, s. 373. *See s. 13.*

, ss. 375, 647. *Execution of decree—Compromise—Estoppel—Civil Procedure Code, s. 257A.*] Although a Court executing a decree is bound by the terms thereof, and cannot add to or vary or go behind them, the effect of s. 375 read with s. 647 of the Civil Procedure Code is that, when a decree is put into execution, the proceedings taken therefor amount to a separate litigation in which the parties can enter into a compromise much in the same manner as in a regular suit. Such a compromise does not extinguish the decree; and the Court executing the decree is bound, subject to the conditions indicated by s. 375, to give effect to the compromise. In execution proceedings the word "suit" in s. 375 must, with reference to s. 647, be read as meaning "execution of decree." By reason of the words in s. 375, "lawful agreement or compromise," the provisions of s. 257A become applicable to such a case; and, so long as the requirements of that section are

satisfied, the compromise becomes a part of the decree itself, and—at least as between the decree-holder and the judgment-debtor—can be given effect to in execution of the decree.

When such a compromise has been duly made and sanctioned by the Court executing the decree, neither the decree-holder nor the judgment-debtor can refile from the position assumed by them in the matter of the compromise.

Even if such a compromise has been irregularly sanctioned by the Court executing the decree—the irregularity not amounting to want of jurisdiction—the compromise must take effect until the order sanctioning it is set aside, and, until that happens the parties are bound by it in all proceedings relating to the execution of the decree, and, where they have acted upon it, they are estopped thereafter from questioning its validity.

*Sita Ram v. Dasrath Das* followed. *Debi Bas v. Gokal Prasad, Ram Lakhan Rai v. Bakhtaur Rat, Fateh Muhammad v. Gopal Das, Ganga v. Murlidhar, Sheo Golam Lal v. Beni Prasad, Lakshmana v. Sakiya Bai, Yella Chetti v. Munisami Reddi, Pisani v. Attorney-General of Gibraltar* and *Sadasiva Pillai v. Ramalinga Pillai* referred to.

Muhammad Sulaiman v. Jhukki Lal . . . . . 228

CIVIL PROCEDURE CODE, s. 539. *See* Trust.

\_\_\_\_\_, s. 544. *See* Civil Procedure Code, ss. 562, 578.

\_\_\_\_\_, s. 561. *See* ss. 562, 578.

\_\_\_\_\_, ss. 562, 578. *Practice—Appeal on full court-fee from decree dismissing suit in part—Remand of whole case, though no cross-appeal or objections preferred—Dismissal of whole suit on remand—High Court competent in second appeal to consider validity of remand order not specifically appealed—Civil Procedure Code, ss. 544, 561.]* A plaintiff whose suit had been decreed in part appealed from so much of the first Court's decree as was adverse to him, and stamped his memorandum of appeal with a stamp which would have covered an appeal from the whole decree. The defendant did not appeal or file cross-objections. The Lower Appellate Court remanded the whole case to the first Court under s. 562 of the Civil Procedure Code, the plaintiff not appealing under s. 588 (28) from the order of remand. The first Court now dismissed the whole suit, and, on appeal by the plaintiff, the Lower Appellate Court confirmed the decree. On a second appeal to the High Court,

*Held*, (i) that the High Court was competent to consider the validity or propriety of the order of remand, though it had not been specifically appealed against; (ii) that the order of remand was *ultra vires*, so far as it related to that part of the first Court's decree which was favourable to the plaintiff, the Lower Appellate Court not having jurisdiction, in the absence of any appeal or objections by the defendant, to disturb that part of the decree; (iii) that the order of remand was not made valid by the subsequent appearance of the plaintiff before the first Court or by the appeal from the first Court's decree on the remand; and (iv) that the case was not covered by s. 578 of the Code.

*Per* MAHMOOD, J.—S. 544 had no application to the case, that section relating only to cases where one or more of the parties arrayed on the same side appealed against a decree passed on a ground common on all, and not to cases where either of two opposite parties appealed from a part of the decree upon a court-fee sufficient for an appeal from the whole.

*Maharajah Moheshur Sing v. The Bengal Government, Forbes v. Ameer-un-nissa Begum, and Shah Mukhan Lal v. Baboo Sree Kishen Singh* referred to.

Cheda Lal, v. Badullah . . . . . 35

\_\_\_\_\_, ss. 562, 564. "*Suit.*" S. 562 of the Civil Procedure Code authorizes a remand only where the entire suit, and not merely a

portion of it, has been disposed of by the Court below upon a preliminary point.

- Banwari Lal v. Samman Lal** . . . . . 488
- CIVIL PROCEDURE CODE, s. 575.** *Practice—Appeal—Difference of opinion on Division Bench regarding preliminary objection as to limitation—Letters Patent, N.-W.P., s. 27—Review of judgment.*] S. 27 of the Letters Patent for the High Court of the N.-W. Provinces has been superseded in those cases only to which s. 575 of the Civil Procedure Code properly and without straining language applies. There are many cases to which s. 575, even with the aid of s. 647, does not apply; and to these s. 27 of the Letters Patent is still applicable.

One of the cases to which s. 575 of the Code does not apply is where a preliminary objection being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time-barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1877), for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a "hearing" of the appeal, but precedes the hearing or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot be said that the Court which, by reason of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless "affirm" the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the senior Judge should, under s. 27 of the Letters Patent, prevail.

*Appaji Bhivrao v. Shivalall Khubchand and Gossami Sri 108 Sri Gridharaji Maharaj Tikait v. Purushotum Gossami* distinguished.

Where, in such a case, the provisions of the second paragraph of s. 575 of the Code were erroneously applied, and the judgment of the junior Judge holding that the appeal should be dismissed as time-barred, prevailed, and the Court, on appeal under s. 10 of the Letters Patent, affirmed such judgment,—*held* that, under the circumstances, there was a mistake or error apparent on the face of the record, and that there was sufficient cause for granting a review of the Court's decree under s. 623 of the Code.

- Husaini Begam v. The Collector of Muzaffarnagar** . . . . . 183
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- ss. 584, 629. *Order on appeal affirming order granting application for review of judgment—Second appeal.*] No second appeal lies to the High Court under s. 584 of the Civil Procedure Code from an order dismissing an appeal under s. 629 from an order granting an application for review of judgment.
- Gopal Das v. Alaf Khan** . . . . . 333
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- s. 586. *Small Cause Court suit.*] For the purpose of determining whether a second appeal lies or is prohibited by s. 586 of the Civil Procedure Code, what must be looked at is not the shape in which the case comes up to the High Court, but the shape in which the suit was originally instituted in the Court of first instance.
- Kiam-ud-din v. Rajjo** . . . . . 13
- 
- ss. 588, 591. *See Letters Patent, s. 10.*
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- ss. 622, 629. *Order on appeal affirming order granting application for review of judgment.*] The High Court will not, in the exercise of its revisional powers under s. 622 of the Code, interfere with an order dismissing an appeal from an order under s. 629, inasmuch as there is a remedy by way of appeal from the final decree at the re-hearing.
- Gopal Das v. Alaf Khan** . . . . . 333

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CIVIL PROCEDURE CODE, s. 623—*Review of judgment. See s. 575, and Letters Patent, N.-W. P., s. 27.*

\_\_\_\_\_, ss. 623, 624. *See Decree, amendment of—.*

\_\_\_\_\_, s. 632. *See Letters Patent, s. 10.*

\_\_\_\_\_, s. 646B. *Reference by District Judge of proceedings in Small Cause Court attacked for want of jurisdiction.]* Before a District Court can make a reference under s. 646B of the Civil Procedure Code, it must be of opinion that the subordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that therefore the matter is one in which the interference of the High Court should be sought.

The word "shall" in s. 646B., clause (1), is not mandatory but directory.

Madan Gopal v. Bhagwan Das . . . . . 304

COMPANY. *See Act I of 1868, s. 6.*

COMPROMISE. *See Civil Procedure Code, ss. 375, 647.*

CONTEMPT OF COURT. *See Criminal Procedure Code, ss. 480, 537.*

CONTRIBUTION. *See Act IX of 1872 (Contract Act), ss. 69, 70.*

COSTS—*Practice*—An unsuccessful application by an official liquidator to place certain shareholders upon the list of contributories having been *bond fide* made in the liquidation of the Company, the Court ordered that the costs of each side should be paid as a first charge out of the estate.

In the matter of the West Hopetown Tea Company, Limited . . . . . 349

\_\_\_\_\_. *Successful preliminary objection to appeal—Practice.]* Where a preliminary objection was successfully taken to the hearing of an appeal, the High Court refused to follow the practice adopted in bankruptcy appeals in England by depriving the respondent of costs on the dismissal of the appeal, on the ground that the appellant had no previous notice of the preliminary objection. *Ex parte Brooks and ex parte Blease*, referred to.

Imtiaz Bano v. Latafat-un-nissa . . . . . 328

COURT-FEE. *See Act VII of 1870, sch. i, No. 5.*

\_\_\_\_\_. *See Civil Procedure Code, ss. 2, 54.*

\_\_\_\_\_. *Suit to obtain a declaratory decree—Suit to set aside a summary order—Consequential relief—Prayer to have property released from attachment—Act VII of 1870 (Court Fees Act), sch. ii, No. 17 (i) and (iii).]* Held, that the court-fee payable on the plaint and memorandum of appeal in a suit under s. 283 of the Civil Procedure Code, praying (a) for a declaration of right to certain property, and (b) that the said property might be released from attachment in execution of a decree, was Rs. 10 in respect of each of the reliefs prayed.

Dildar Fatima v. Narain Das . . . . . 365

CRIMINAL PROCEDURE CODE, s. 35. "*Distinct offences*"—*Act XLV of 1860, ss. 75, 411—Practice.]* A person convicted under ss. 411—75 of the Penal Code is not convicted of "*distinct offences*" within the meaning of s. 35 of the Criminal Procedure Code. *Queen-Empress v. Zor Singh* explained.

Where an offence under s. 411 read with s. 75 of the Penal Code appears to be deserving of a greater punishment than the Magistrate trying it can award, the best course for him to adopt is to commit the accused for trial to the Court of Session.

Queen-Empress v. Khalak . . . . . 393

\_\_\_\_\_, s. 260. *Summary trial—Act XIII of 1859, s. 2.]* Offences under s. 2 of Act XIII of 1859 are triable summarily under s. 260 of the Criminal Procedure Code.

Queen-Empress v. Indarjit . . . . . 262

**CRIMINAL PROCEDURE CODE, ss. 337, 339.** *Accomplice—Tender of pardon, effect of—Subsequent trial of accomplice for connected offence.*—A prisoner charged before a Magistrate at Benares with offences punishable under ss. 471, 472 and 474 of the Penal Code made a confession to the Magistrate in respect of those offences. He was then sent in custody to Calcutta, and was there, together with other persons, charged before a Magistrate with offences punishable under ss. 467, 473 and 475. The conduct to which these charges related was closely connected and mixed up with that to which the charges first mentioned had reference. Under s. 337 of the Criminal Procedure Code, the Magistrate at Calcutta tendered a pardon to the prisoner upon the conditions specified in that section, and the prisoner accepted the pardon, and gave evidence for the prosecution. The Magistrate held that this evidence was not sufficiently corroborated, and accordingly discharged all the accused, but the pardon was not withdrawn, and there was nothing to show that the Magistrate was dissatisfied with the prisoner's statements or considered that he had not complied with the conditions on which the pardon was tendered. Subsequently, the prisoner was committed by the Magistrate of Benares for trial before the Court of Session upon the charges under ss. 471, 472 and 474 of the Penal Code. He pleaded not guilty, but did not in terms plead the pardon as a bar to the trial, though he made some reference to the subject; and the Sessions Judge having made a brief inquiry as to the proceedings at Calcutta, came to the conclusion that there was no sufficient proof of any conditional pardon, and convicted and sentenced the accused.

*Held*, that by the terms of the conditional pardon granted to the accused by the Calcutta Magistrate, the conditions of which were satisfied, as was shown by its never having been withdrawn, the accused was protected from trial at Benares in respect of the offences under ss. 471, 472 and 474, and was not liable to be proceeded against in respect of them, and that the trial and conviction were therefore illegal.

Although s. 337 of the Criminal Procedure Code does not in terms cover a case where a Magistrate holding a preliminary inquiry for committal against several persons tenders a conditional pardon to one of them, examines him as a witness, and subsequently discharges all the accused for want of a *prima facie* case against them, the words "every person accepting a tender under this section shall be examined as a witness in this case" mean that for all purposes (subject to failure to satisfy the conditions of the pardon as provided for by s. 339) such a person ceases to be triable for the offence or offences under inquiry or (with reference to s. 339) for "any other offence of which he appears to have been guilty in connection with the same matter" while making "a full and true disclosure of the whole of the circumstances within his knowledge relative to the offences" directly under inquiry. The words last quoted refer to the importance, when a pardon is tendered, of encouraging the approver to give the fullest details, so that points may be found in his evidence which may be capable of corroboration. The question of how far the pardon protects him, and what portion of it should not protect him, ought not to be treated in a narrow spirit.

Queen-Empress v. Ganga Charan . . . . .

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**s. 395.** *Imprisonment in lieu of whipping—Court not authorized to inflict fine in lieu of whipping.*—A Court has no power under s. 395 of the Criminal Procedure Code to revise its sentence of whipping by inflicting a fine. In cases where the sentence of whipping cannot be carried out, all that the Court can do is either to remit the whipping altogether, or to sentence the offender, in lieu of such whipping or of so much of the sentence of whipping as was not carried out, to imprisonment, &c.

The word "imprisonment" in s. 395 of the Criminal Procedure Code means a substantive sentence of imprisonment, and not imprisonment for default in payment of a fine.

Queen-Empress v. Sheodin . . . . .

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**CRIMINAL PROCEDURE CODE**, ss. 480, 537. *Contempt of Court—Act XLV of 1860 (Penal Code), s. 228.*] The procedure laid down in s. 480 of the Criminal Procedure Code should be strictly followed. The provisions of the section should be applied then and there, at any rate before its rising, by the Court in whose view or presence a contempt has been committed which it considers should be dealt with under s. 480.

Where a Magistrate in whose presence contempt was committed took cognizance of the offence immediately, but in order to give the accused an opportunity of showing cause, postponed his final order for some days,—*held*, that such action, though it might be irregular, was not illegal, and as the accused had not been in any way prejudiced, was covered by s. 537 of the Criminal Procedure Code.

*Held*, also that under the circumstances, it was doubtful whether there was any necessity for the Magistrate to postpone the final order until the accused had had an opportunity of showing cause against it, and that he should have directed the detention of the accused and dealt with the matter at once or before his rising.

Queen-Empress v. Patambar Bakhsh . . . . . 361

\_\_\_\_\_ , s. 488. "*Cruelty*."] The word "*cruelty*" in s. 488 of the Criminal Procedure Code is not necessarily limited to personal violence. *Kelly v. Kelly* and *Tomkins v. Tomkins*, referred to.

Rukmin v. Peare Lal . . . . . 490

"**CRUELTY.**" See Criminal Procedure Code, s. 488.

**DECLARATORY SUIT.** See Hindu widow.

**DECREE, AMENDMENT OF.** *Decree affirmed on appeal—Jurisdiction—Civil Procedure Code, ss. 206, 579, 623, 624—Limitation—Review of judgment—Res judicata.*] The effect of s. 579 of the Civil Procedure Code is to cause the decree of the Appellate Court to supersede the decree of the first Court even where the appellate decree merely affirms the original decree, and does not reverse or modify it.

Where a decree has been affirmed on appeal, the only decree which can be amended under s. 206 of the Code is the decree to be executed, and the decree to be executed is that of the Appellate Court and not the superseded decree of the first Court, though the latter may, if necessary, be referred to for the purpose of executing the appellate decree.

The only Court which has jurisdiction to amend the appellate decree is the Court of Appeal.

So *held* by the Full Bench, MAHMOOD, J., dissenting, *Shohrat Singh v. Bridgman*, explained and followed. *Kistobinkur Roy v. Raja Burrodacant Roy*, discussed.

The insertion of the word "not" in the last line but one of the judgment and also in the head-note in *Shohrat Singh v. Bridgman* was a clerical error.

*Per* MAHMOOD, J.—Where a decree has been simply affirmed on appeal, s. 579 of the Code does not imply that the appellate decree supersedes the original decree so as to render it ineffective for purposes of execution. In such a case the lower Court continues to have jurisdiction to entertain an application for amendment of its own decree under s. 206 of the Code; and such application is not governed by any article of the Limitation Act, and may be made at any time. It may be granted under s. 206, even where an application for review of judgment under s. 623 upon the same grounds would be barred by s. 624.

A decree awarding the plaintiffs possession of immovable property did not comply with s. 206 of the Code by containing the particulars of the claim or



specifying clearly the relief granted. On appeal by the defendant, the High Court in general terms confirmed the decree and dismissed the appeal. The decree-holders then applying for execution, the judgment-debtors objected that the decree was incapable of execution, and this objection was allowed by the High Court on appeal. The decree-holders applied to the High Court to amend its decree, but the application was refused; and they then made a similar application to the first Court to amend its original decree which had been affirmed on appeal. This application was granted by a Judge who was not the Judge who had passed the original decree.

*Held*, by the Full Bench (MAHMOOD, J., dissenting), that the Court below had no jurisdiction to make such amendment, the original decree having been superseded by the High Court's appellate decree.

*Held*, by MAHMOOD, J., *contra*, that the Court below had jurisdiction to make such amendment, and could make it at any time; that the High Court's decree could not be amended, because the former order refusing amendment had become final and operated as *res judicata*; that the amendment of the original decree under s. 206 was not barred by s. 624; and that it would be denying justice on account of technicalities to hold that the original decree, though affirmed on appeal, could be neither executed nor amended.

Muhammad Sulaiman Khan v. Muhammad Yar Khan . . . . . 267

DECREE, AMENDMENT OF. *See* Execution of decree.

————— *Appeal. See* Civil Procedure Code, ss. 2, 54.

DEFAMATION. *Suit by father in his own right for defamation of daughter — Suit not maintainable.* A suit for defamation of his daughter cannot be maintained by a Hindu father suing in his own right and not as general attorney or on behalf of the daughter. A suit for defamation can only be brought by the person actually defamed, if the person is *sui juris*, and if not *sui juris*, then under the provisions of the Civil Procedure Code, by his guardian or next friend. *Dawan Singh v. Mahip Singh* and *Parvathi v. Mannar* distinguished. *Subbaiyar v. Kristnaiyar* and *Luckumsey Rowji v. Hurbun Nursey* referred to.

Daya v. Paran Sukh . . . . . 104

ESTOPPEL. *See* Civil Procedure Code, ss. 375, 647.

————— *See* Mortgage, usufructuary (1).

EVIDENCE—*Witnesses. See* Act. I of 1872, s. 118, and Act X of 1873, ss. 6, 13.

EXECUTION OF DECREE—*Civil Procedure Code, ss. 311, 313, 320, 322B, 322C, 322D—Transfer of execution to Collector—Application to Civil Court to set aside sale held by Collector on the ground of irregularity.* *Held*, by the Full Bench that an application to set aside, on the ground of material irregularity within the meaning of s. 311 of the Civil Procedure Code, a sale held by the Collector in execution of a decree transferred to him for execution under s. 320, cannot be entertained by a Civil Court. *Madho Prasad v. Hansa Kuar* followed. *Nathu Mal v. Lachmi Narain* distinguished.

*Per* EDGE, C. J.—The intention of the Legislature as expressed in s. 320 and the following sections of the Civil Procedure Code was not to allow any delegation to the Collector of power to adjudicate upon questions of title, but, in other matters, to hand over all the proceedings to the Collector, and to withdraw the matters so handed over from the purview of the Civil Courts to that extent, but not questions of title or the other questions, if in dispute, referred to in ss. 322B, 322C or 322D.

Keshabdeo v. Radhe Prasad . . . . . 94

EXECUTION OF DECREE. *Decree affirmed on appeal—Amendment of decrees by first Court after affirmance—Objection by judgment-debtor to execution of amended decree—Appeal from order disallowing objection—Objection allowed on*

*appeal.*] The decree of a Court of first instance having on appeal been affirmed by the High Court, the first Court altered the decree which had been affirmed, intending to bring it into accordance with the judgment of the High Court. After the decree had been altered, application was made to execute it as altered, but this was opposed by the judgment-debtor on the ground that that was not the decree which could be executed.

*Held* by the Full Bench that the objection must prevail, on the ground that the decree sought to be executed was not that of the Appellate Court, and that the decree had been altered by the first Court, which had no power to alter it.

*Abdul Hayai Khan v. Chunia Kuar* referred to.

*Held* by the Division Bench that the order of the first Court disallowing the objection and directing that execution of the decree as altered should proceed could not be regarded as passed under s. 206 of the Civil Procedure Code, but was an order passed in execution of decree, and as such was appealable.

*Muhammad Sulaiman Khan v. Fatima* . . . . . 314

See Civil Procedure Code, ss. 290, 311.

, s. 315.

, ss. 375, 647.

*Decree payable by instalments—Default—Waiver—Limitation.*] A decree was made for payment of the decretal amount by monthly instalments running over a period of twelve years; and it was provided that on default the decree-holder might execute the decree as a whole for the balance then due. In 1883 a default was made, and in 1884 the decree-holder filed an application for execution in respect thereof, but did not proceed with it, and continued to receive the monthly instalments. In 1887 he made another application for execution, in which he relied on the same default.

*Held*, that the default, if it was one, had been waived by the decree-holder, and that such waiver was a good defence to the present application. *Mumford v. Peal* and *Asmutulla Dalal v. Kally Churn Mitter*, distinguished.

*Buddhu Lal v. Bekkab Das* . . . . . 482

**FORECLOSURE.** See Mortgage, usufructuary.

**GIFT.** See Muhammadan Law.

**GOVERNOR-GENERAL IN COUNCIL, LEGISLATIVE POWER OF THE.**  
See Statute 24 and 25 Vic., c. 67, s. 22.

**HIGH COURT'S POWERS OF REVISION.** See Civil Procedure Code, ss. 622, 629.

**HINDU LAW.** *Joint Hindu family—Hindu widow—Maintenance—Suit by sister-in-law against brother-in-law—Death of plaintiff's husband prior to his father's death, and therefore before devolution of father's self-acquired estate—"Ancestral property"—Legal obligation of heir to fulfil moral obligations of last proprietor.*] In a Hindu family governed by the Mitakshara law, and living joint in food and workshop, there was no joint or ancestral property, but the father possessed certain separate and self-acquired property. He had two sons, one of whom predeceased him, leaving a widow. He died intestate, leaving a son and widow. The widow of the son who had predeceased his father was at the time of her husband's death a minor; she had never cohabited with him or resided with his family or received from them any maintenance, but had always resided with and been maintained by her own father. After her father-in-law's death, she sued her brother-in-law and her father-in-law's widow for

maintenance, which she claimed to have charged upon the immovable property which had belonged to the father-in-law during his lifetime, and which was now in the hands of the defendants.

*Held* (MAHMOOD, J., expressing no opinion on this point) that the property in suit, though inherited by the defendants, could not, so far as the plaintiff's rights were concerned, be correctly described as "ancestral property" in the defendants' hands, from which she would be entitled to maintenance, inasmuch as, during the father's lifetime, it was not in any sense ancestral, and the sons had no coparcenary interest in it, but merely the contingent interest of taking it on their father's death intestate, and, in the case of the plaintiff's husband such interest, by reason of his predeceasing his father, never became vested. *Adhibai v. Cursandas Nathu* dissented from on this point *Savitribai v. Laxmibai* referred to.

*Held*, however, that the father was under a moral, though not a legal, obligation not only to maintain his widowed daughter-in-law during his lifetime, but also to make provision out of his self-acquired property for her maintenance after his death; and that such moral obligation in the father became, by reason of his self-acquired property having come by inheritance into the hands of his surviving son, a legal obligation enforceable by suit against that son (who took the estate not for his own benefit, but for the spiritual benefit of the last proprietor) and against the property in question. *Adhibai v. Cursandas Nathu*, *Ganga Bai v. Sita Ram*, *Kalu v. Kashibai*, *Khetramuni Dasi v. Kashi Nath Das*, *Rajjomonoy Dossee v. Shibchunder Mullick*, and *Tulsha v. Gopal Rai* referred to.

*Per* MAHMOOD, J.—There is no difference between the Mitakshara and the Bengal Schools of Hindu Law regarding the principle that the right of inheritance is based on the spiritual benefit which the heir, by taking the estate, renders to the soul of the deceased proprietor. There is a difference between the two schools only on a matter of detail relating to questions of preference between various competing classes of heirs.

*Janki v. Nand Ram*

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*Joint Hindu family—Maintenance—Gift to widow by member of joint Hindu family—Construction—Gift presumed to be of life estate only.* Disputes having arisen between the sole surviving member of a joint Hindu family and his brother's widow, an amicable arrangement was come to, and certain deeds were executed by both parties, under which the widow was placed in possession of a certain house. On the part of the brother-in-law it was recited that, with a view to permanently settling the matters in dispute, he had received in cash from the widow the value of his share in the house; that she had been put in possession of the house and was in sole proprietary possession thereof, and that he had no connection whatever with it. Subsequently the widow executed a deed of gift purporting to convey to the donee an absolute proprietary title to the house. After her death the brother-in-law brought a suit against the donee to recover possession of the house, on the ground that the deed of gift could not convey to him more than the life interest of the widow donor.

*Held*, that the deed of gift must be construed with reference to the nature of the general rights of the donor at the time of execution, as a Hindu widow in a joint Hindu family, entitled only to maintenance. *Sreemutty Rabuttty Dossee v. Shibchunder Mullick* and *Dinonath Mukerji v. Gopal Churn Mukerji* referred to.

*Held* also, having regard to the rules of the Hindu law regarding the possession by widows of joint family property in lieu of maintenance, and to the experience of the Courts in connection with such matters, that it was for the donee to establish clearly and specifically that the donor, at the time when she executed the deed of gift, had any such absolute right or ownership as would entitle her to alienate the property for any interest beyond a life estate.

*Held*, further, that there was nothing in the deeds under which the donor obtained possession of the property, which placed beyond doubt the intention of the parties that she should be entitled to the absolute ownership of the property; and that her estate, therefore, could at best be regarded as a life estate, and the deed of gift as binding upon the plaintiff during her lifetime, but not further.

Ganpat Rao v. Ram Chandar . . . . . 296

**HINDU LAW.** *Joint Hindu family—Money decree against deceased member—Execution after judgment-debtor's death against joint family property not allowed.*] The mere obtaining of a simple money decree against a member of a joint Hindu family without any steps being taken during his lifetime to obtain attachment under or execution of the decree does not entitle the decree-holder, after the judgment-debtor's death and a subsequent partition, to bring to sale in execution of the decree the interest which the judgment-debtor had in the joint family property. *Suraj Bansi Koor v. Sheo Pershad Singh, Rai Balkishen v. Ras Sita Ram and Balbhadar v. Bisheshar*, referred to.

Jagannath Prasad v. Sita Ram . . . . . 302

————. *See* Hindu widow.

————. *See* Trust.

————**WIDOW.** *Alienation by widow to her married daughter—Reversioner—Declaratory suit—Act I of 1877 (Specific Relief Act), s. 42.*] The effect of a gift by a Hindu widow of her deceased husband's estate to her daughter is merely to accelerate the latter's succession and put her by anticipation in possession of her life estate, and, therefore, affords no cause of action to a reversioner to maintain a declaratory suit impeaching the gift.

*Per* MAHMOOD, J., that in the exercise of the discretion allowed to the Court by s. 42 of the Specific Relief Act, a declaratory decree should be refused to the plaintiff in such a case, where the donee was a married woman and capable of bearing a son, who would be the next reversioner to the full ownership of the estate of the donor's deceased husband.

*Indar Kuar v. Lalita Prasad Singh and Udhar Singh v. Ramee Koonwur* referred to.

Bhupal Ram v. Lachman Kuar . . . . . 253

**HINDU WIDOW.** *See* Act XV of 1856, s. 2.

————. *See* Hindu Law.

**HUSBAND AND WIFE.** *See* Criminal Procedure Code, s. 488.

**INDIAN COUNCILS ACT.** *See* Statutes 24 and 25, Vic. c. 67, s. 22.

**INTEREST.** *See* Bond.

**JOINT HINDU FAMILY.** *See* Hindu Law.

**JURISDICTION—Civil and Revenue Courts.** *See* Act XII of 1881, s. 103 and s. 208.

**LETTERS PATENT, N.-W. P., s. 10.** *See* Act VII of 1870, sch. i, No. 5.

————, s. 10. *Appeal from single Judge—"Judgment"—Interlocutory order—Order refusing leave to appeal in formá pauperis—Civil Procedure Code, ss. 588, 591, 632.*] Under ss. 588 and 591 read with s. 632 of the Civil Procedure Code, no appeal lies, under s. 10 of the Letters Patent, for the High Court for the North-Western Provinces, from an order of a single Judge refusing an application for leave to appeal in formá pauperis. *Achaya v. Ratnavelu* and in *re Rajagopal* followed. *Hurriah Chunder Chowdhry v. Kali Sunderi Dobi* distinguished.

Banno Bibi v. Medhi Husain . . . . . 375

**LETTERS PATENT, N.-W. P., s. 27.** *Practice—Difference of opinion on Division Bench regarding preliminary objection as to limitation—Civil Procedure Code, s. 575—Review of judgment.*] S. 27 of the Letters Patent for the High Court of the N.-W. Provinces has been superseded in those cases only to which s. 575 of the Civil Procedure Code properly and without straining language applies. There are many cases to which s. 575, even with the aid of s. 647 does not apply; and to these s. 27 of the Letters Patent is still applicable.

One of the cases to which s. 575 of the Code does not apply is where a preliminary objection being taken to the hearing of a first appeal before the High Court on the ground that the appeal is time barred, the Judges of the Division Bench differ in opinion as to whether the appellant has shown sufficient cause, within the meaning of s. 5 of the Limitation Act (XV of 1877), for not presenting the appeal within the prescribed period. The decision of such a preliminary objection is not a "hearing" of the appeal, but precedes the hearing, or determines that there is no appeal which the Court can hear or decide. Where such a preliminary objection is allowed, it cannot be said that the Court which, by reason of the Limitation Act, has no jurisdiction to hear the appeal, should nevertheless "affirm" the decree of the Court below. In the case of such a preliminary objection and such a difference of opinion (the Bench being equally divided), the opinion of the senior Judge should, under s. 27 of the Letters Patent, prevail.

*Appaji Bhiorav v. Sheolall Khubchand and Gossami Sri 108 Sri Gridhariji Maharaj Tikait v. Purushotom Gossami* distinguished.

Where, in such a case, the provisions of the second paragraph of s. 575 of the Code were erroneously applied, and the judgment of the junior Judge holding that the appeal should be dismissed as time-barred, prevailed, and the Court, on appeal under s. 10 of the Letters Patent, affirmed such judgment,—*held* that under the circumstances there was a mistake or error apparent on the face of the record, and that there was sufficient cause for granting a review of the Court's decree under s. 623 of the Code.

*Husaini Begam v. The Collector of Muzaffarnagar* . . . . . 183

**LIMITATION.** *See* Decree, amendment of.

**MAINTENANCE.** *Gambling in litigation—Agreement opposed to public policy—Act IX of 1872 (Contract Act), s. 23.*] The judgment of the Privy Council in *Ram Coomar Coondoo v. Chunder Cantoo Mookerjee* shows that while the specific English law of maintenance and champerty has not been introduced into India, and while fair agreements to supply funds to carry on litigation in consideration of having a share of the property, if recovered, should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bond fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy and not enforced.

For the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs. 25,000, upon which the obligee sued upon the bond. It was found that, apart from

the monies borrowed by the obligor, from time to time, he was without even the means of subsistence; that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him; that no fraud or improper pressure appeared to have been applied to him; that his legal advisers had acted honestly and to the best of their ability in his interests; that there was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond; that without such assistance he could not have appealed to the High Court; and that the obligee gave him such assistance upon his application.

*Held* also, that the obligee could not, under the circumstances, have considered both that the obligor's claim was a just one and reasonably likely to succeed, and that the Rs. 25,000 was a reasonable recompense in the event of success for the advance of Rs. 3,700; and the bond was, therefore, a gambling in litigation, which it would be contrary to public policy to enforce.

The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 per cent. per annum from the date of the bond to the date of the decree, with costs in proportion, and interest at 6 per cent. per annum on the Rs. 3,700, interest and costs, from the date of the decree until payment.

Chunni Kuar v. Rup Singh . . . . . 57

**MAINTENANCE.** *See* Hindu Law.

—OF WIFE. *See* Criminal Procedure Code, s. 488.

**MISJOINDER OF CAUSES OF ACTION.** *Civil Procedure Code, ss. 23, 45.]*

The judgment of the majority of the Full Bench in *Narsingh Das v. Mangal Dubey* except in its general observations as to the provisions of the Civil Procedure Code relating to joinder of parties and causes of action, proceeded upon and had reference to the special circumstances of the case, and to the allegations made by the plaintiff in his plaint, and was not intended to be carried further.

In a suit for possession of immoveable property, part of which had been usufructually mortgaged by defendant No. 1 to defendant No. 2, the plaintiff alleged that the first defendant had no title to make such a mortgage, while both defendants maintained such title.

*Held* that, inasmuch as the title of defendant No. 2 was derived from defendant No. 1, and stood or fell with the failure or success of the plaintiff's claim against the latter, there were not two causes of action, but one, namely, the infringement of the plaintiff's right by the defendant No. 1, and hence the suit was not bad for misjoinder of causes of action.

Indar Kuar v. Gur Prasad . . . . . 33

**MORTGAGE.** *Conditional sale—Foreclosure—Suit for possession—Regulation XVII of 1806, s. 8—Cause of action—Limitation—Act XIV of 1859, s. 1 (12).]*

A suit for foreclosure was brought in 1886 upon a mortgage by conditional sale executed in 1846, the condition being for payment within five years from that date. The deed provided that, in default of payment within the prescribed period, the property mortgaged "will be foreclosed (*baibai*), and this mortgage-deed will be considered as an absolute sale-deed." Between 1846 and 1886 no foreclosure proceedings or other steps were taken by the mortgagee, and no admission of liability was made by the mortgagor.

*Held* that, by reason of Act XIV of 1859 (Limitation Act), the plaintiff's remedy was barred during the currency of that Act, and that the time within which he was entitled to maintain an action for foreclosure, if he had taken the proper proceedings, expired in 1863.

*Held* also that, even if foreclosure proceedings under Regulation XVII of 1806 had been taken, the cause of action was the original non-payment of the money on the due date, and the provisions of the Regulation could not create a fresh cause of action. *Dononath Gangooly v. Narsingh Proshad Doss* referred to.

Murlidhar v. Kanchan Singh . . . . . 144

**MORTGAGE.** *Redemption by co-mortgagor—Suit by other mortgagors against redeeming mortgagor for redemption of their shares—Limitation—Act XV of 1877 (Limitation Act), sch. ii, Nos. 144, 148.]* In 1828 one of several co-mortgagors redeemed an usufructuary mortgage executed in 1822 and obtained possession. The other mortgagors brought a suit against the heir of the redeeming mortgagor in 1886 for redemption of their shares in the mortgaged property.

*Held*, that the limitation applicable to the suit was that provided by art. 148, sch. ii, of the Limitation Act (XX of 1877); that time ran not from the date of the redemption in 1828, but from the time when it would have run against the original mortgagor if he had been a defendant, i.e., the date of the original mortgage of 1822; and that the suit was therefore barred by limitation. *Umr-un-nissa v. Muhammad Yar Khan* explained. *Nura Bibi v. Jagat Narain* and *Ram Singh v. Baldeo Singh* referred to.

Ashfaq Ahmad v. Wazir Ali . . . . . 423

**MORTGAGE.** *See* Act IV of 1882 (Transfer of Property Act), ss. 88, 89, 90.

————. *See* Act IX of 1872 (Contract Act), ss. 69, 70.

———— **BY CONDITIONAL SALE.** *See* Pre-emption.

————, **USUFRUCTUARY.** *Redemption—Limitation—Pleading—Burden of proof—Civil Procedure Code, s. 60—Act XV of 1877 (Limitation Act), s. 28, sch. ii, No. 148—Act I of 1872 (Evidence Act), s. 110.]* There is a clear distinction as to the onus of proof between cases where a plaintiff sues for possession of land by redemption of mortgage and cases where the defence to a suit for possession of land is twelve years' adverse possession by the defendant. In each case the plaintiff must plead his title, and if that title is in issue, he must make it out by at least *prima facie* evidence before the defendant can be put to proof of his defence. Where the defence is twelve years' adverse possession, the defendant must plead and make out the title he alleges, and thus show that the title of the plaintiff, which otherwise had been proved or admitted, was lost. In a suit for possession of land by redemption of mortgage, the very nature of which presupposes that the possession of the defendant or his predecessor was lawful, the plaintiff must in his plaint show the title upon which he relies, and therefore a title subsisting at the date of suit. Unless he gives *prima facie* evidence to show that his suit is within time, he fails to prove his title or subsisting right to the property.

*Philipps v. Philipps, Dawkins v. Lord Penrhyn, Radha Gobind Roy Sahab v. Inglis, Rao Karam Singh v. Rajah Bakar Ali Khan, Rajah Kishen Dutt Panday v. Narendar Bahadur Singh, Ram Chandra Apaji v. Balaji Bhaures* and other cases referred to.

Parmanand Misr v. Sahib Ali . . . . . 438

————. *Suit for redemption—Conditional decree—Failure of mortgagor to pay in accordance with decree—Subsequent suit for redemption—Res judicata—Civil Procedure Code, s. 13—Foreclosure—Act IV of 1882 (Transfer of Property Act), s. 93—Estoppel—Act I of 1872 (Evidence Act), s. 115.]* In a suit for redemption of a usufructuary mortgage, a decree for redemption was passed conditional upon the plaintiff praying the defendants, within a time specified a sum which was found still due to the latter, and the decree provided that if such sum were not paid within the time specified, the suit should stand dismissed. The plaintiff failed to pay, and the suit

accordingly stood dismissed. Subsequently, he again sued for redemption, alleging that the mortgage debt had now been satisfied from the usufruct.

*Held*, having regard to the distinction between simple and usufructuary mortgages, that the decree in the former suit only decided that, in order to redeem and get possession of the property, the mortgagor must pay the sum then found to be due by him to the mortgagee, and did not operate as *res judicata* so as to bar a second suit for redemption, when, after further enjoyment of the profits by the mortgagee, the mortgagor could say that the debt had now become satisfied from the usufruct.

Having regard to s. 93 of the Transfer of Property Act (IV of 1882), in a suit brought by a usufructuary mortgagor for possession on the ground that the mortgage debt has been satisfied from the usufruct, and in which the plaintiff is ordered to pay something because the debt has not been satisfied as alleged, the decree passed against such a mortgagor for non-payment has not the effect of foreclosing him for all time from redeeming the property.

The decision in *Sheikh Golam Hossein v. Musammat Alla Rukhes Beebes* treated as not binding since the passing of the Transfer of Property Act. *Chhaita v. Pura Sookh* and *Anrudh Singh v. Sheo Prasad* referred to.

Where the plaintiff in a suit for redemption of a usufructuary mortgage was the original mortgagor, who had by a registered instrument assigned his interest in the mortgaged property to another, and the assignee did not apply to be made a party to the suit, but put forward or consented to have put forward the original mortgagor as the person entitled to redeem,—*held* that as there was nothing in that litigation to show that the defendant-mortgagee was in any way induced to alter his position or to do any act which he would not otherwise have done in consequence of the assignee's conduct, the latter was not estopped by s. 115 of the Evidence Act (I of 1872) or by any principle of equitable estoppel from afterwards suing on his own account for redemption.

Muhammad Sami-ud-din Khan v. Mannu Lal . . . . . 386

**MORTGAGE USUFRUCTUARY.** *Suit for sale by usufructuary mortgagee—Suit not maintainable—Act IV of 1882 (Transfer of Property Act), s. 67 (a).]* Under s. 67 (a) of the Transfer of Property Act (IV of 1882), a usufructuary mortgagee, whose possession has not been disturbed, cannot maintain a suit either for foreclosure or for sale on non-payment of the mortgage-money. *Chowdhri Umrao Singh v. The Collector of Moradabad, Dulli v. Bahddur, Ganesh Kooer v. Deedar Buksh, Venkatasami v. Subramanya and Jhabbu Ram v. Girddari Singh* referred to.

Umda v. Umrao Begam . . . . . 367

**MUHAMMADAN LAW.** *Claim to possession of property under deed of sale—Consideration—"Mushaa"—Effect of possession following upon gift to render it valid.]* The law relating to the invalidity of gifts of "mushaa," i.e., the prohibition of the gift of an undivided part in property capable of partition, ought to be confined within the strictest rules; and the authorities on the Muhammadan law show that possession taken under a gift, even although that gift might with reference to "mushaa" be invalid without it, transfers effectively the property given, according to the doctrines of both the Shia and the Sunni Schools. Possession once taken under a gift is not invalidated, as regards its effect in supporting the gift, by any subsequent change of possession.

The subject of the gift was shares in revenue-paying villages, with land, houses and moveables. Of the greater portion of this property, the donor, a mother giving them to her daughter, had only so far possession that she was in receipt of the rents and profits. In the deed of gift she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she had made the donee, her daughter, possessor of all the properties; and she directed that the gift should be carried into effect by the



daughter's husband, who was manager of estates on behalf of both mother and daughter before then.

*Held*, in a suit for the possession of the property on a sale by the heir of the donor, brought by the vendees against him, and joining as defendants the heirs of the daughter, then deceased, that sufficient possession had been taken on behalf of the daughter to render the gift effectual, and to defeat the claim as against her heirs.

Muhammad Mumtas Ahmad v. Zubaida Jan . . . . . 400

**MUHAMMADAN LAW.** *Gift—Hiba-bil-iwas—Gift made in consideration of services rendered—Donor not in possession—Possession not delivered to donee—Gift invalid.*] The fundamental conception of *hiba-bil-iwas*, or a gift for an exchange as understood in the Muhammadan Law, is that it is a transaction made up of two separate acts of donation, i.e., of mutual or reciprocal gifts of specific property between two persons, each of whom is alternately donor and donee. It does not include the case of a gift in consideration only of natural love and affection or of services or favours rendered. Nor does such a gift fall under the category of *hiba-bil-iwas* in its improper sense of sale; but it is an ordinary gift subject to all the conditions as to validity which the Muhammadan Law provides.

A gift of immoveable property not at any time in the possession of the donor, but in that of a trespasser, and consequently never delivered by the donor to the donee, is void under the Muhammadan Law. *Kasim Hossein v. Sharif-un-nissa, Sahib-un-nissa Bibi v. Hafiza Bibi, and Shaikh Ibrahim v. Shaikh Suleman*, distinguished; *Mohim-ud-din v. Manchershah, Mullick Abdool Guffoor v. Muleka, and Shahazadee Hasara Begum v. Khaja Hossein Ali Khan*, referred to.

Rahim Bakhsh v. Muhammad Hasan . . . . . 1

"MUSHAA." *See* Muhammadan Law.

—————. *See* Pre-emption.

**OATH OR AFFIRMATION.** *See* Act X of 1873, ss. 6, 13 *Ibrahim v. Shaikh*.

**PARDON, EFFECT OF TENDER OF—Accomplice.** *See* Criminal Procedure Code, ss. 337, 339.

**PARTIES.** *See* Question in issue.

**PARTITION.** *See* Act XIX of 1873, s. 113.

**PRACTICE—Appeal on full court-fee from decree dismissing suit in part—Remand of whole case, though no cross-appeal or objection preferred.** *See* Civil Procedure Code, ss. 562, 578.

—————. *Danger of deciding case upon a document by construction put on another document in another suit.*] The danger pointed out of deciding one case relating to a bond by the construction placed in another suit on another and a different bond.

Bhagwant Singh v. Daryao Singh . . . . . 416

—————. *See* Costs; Decree, amendment of; and Execution of decree.

**PRE-EMPTION.** *Mortgage by conditional sale—Foreclosure—Regulation XVII of 1806—Suit by mortgagee for possession—Compromise and decree thereon—Mortgagee accepting part of the property in suit—Suit for pre-emption—Pre-emptor not asserting or proving validity of foreclosure proceedings—Pre-emptor's title referred to date of compromise and decree—Purchase-money.*] The mortgagee under a deed of conditional sale executed in 1878 took foreclosure proceedings under Regulation XVII of 1806, and, the year of grace having expired, a foreclosure proceeding was recorded on the 18th September 1892, declaring the mortgage to have been foreclosed. In August 1895 the

mortgagee instituted a suit for possession of the mortgaged property. On the 19th September 1885 the suit was compromised, the mortgagee accepting a part of the mortgaged property, and relinquishing the remainder. A decree was passed in the terms of the compromise. Subsequently, a suit for pre-emption was brought against the mortgagor and mortgagee to enforce pre-emption in respect of the alienation. The plaintiff claimed to pre-empt the whole of the property to which the deed of 1878 related, including the portion relinquished by the conditional vendee under the compromise and decree of the 19th September 1885.

*Held*, that, although upon the expiration of the year of grace, the ownership of mortgaged property vested in a conditional vendee even though he might not have obtained a decree establishing or declaring his right, and the right of pre-emption accrued on the date when the conditional sale thus became absolute, yet foreclosure proceedings under the Regulation, being of a purely ministerial character, were not conclusive or even *prima facie* evidence in a subsequent litigation against the conditional vendor that a valid foreclosure had been duly effected; that strict observance of the requirements of the Regulation were conditions precedent to the right of foreclosure; and that, in the present case, as the plaintiff had not asserted or attempted to prove that all those requirements had been fulfilled so as to result in an actual foreclosure and consequent accrual of pre-emption at the end of the year of grace, no foreclosure was shown to have taken place prior to the compromise of the 19th September 1885, and the plaintiff's right of pre-emption accrued on and must be referred to that date, and consequently extended only to the property to which the compromise related, and the price payable by the plaintiff was the amount specified in the compromise. *Bhadu Mahomed v. Kadha Churn Bolia, Sheodeen v. Sookit and Tuwakkul Rai v. Lachman Rai* distinguished. *Norender Narain Singh v. Dwarka Lal Mundur, Madho Prashad v. Gajadhar, Sitla Bakhsh v. Lalta Prasad and Jagat Singh v. Ram Bakhsh*, referred to.

Ajaib Nath v. Mathura Prasad . . . . . 164

PRE-EMPTION. *See* Civil Procedure Code, s. 214.

*See* Wajib-ul-arz.

*Wajib-ul-arz—Construction—*“*Karibi*,” meaning of.] The word “*karibi*” used by itself in the pre-emptive clause of a *wajib-ul-arz* to indicate shareholders “near” to the vendor is ambiguous and inadequate to express the intentions of the shareholders.

The pre-emptive clause in the *wajib-ul-arz* of a village gave a right of pre-emption in cases of sale by shareholders, first to “*bhai kakiki*” (own brothers), next to “*karibi*” (near), and next to co-sharers in the same *thoke* as a vendor.

*Held*, that although the word “*karibi*” must be read in connection with the preceding word “*bhai*,” the words “*bhai karibi*” could not reasonably be confined to cousins, but must be construed as meaning “*bhai bund*” or “*bhai log*,” so as to include all near relatives, both male and female.

*Held*, also that a vendor's father's brother's widow, holding a share in the village absolutely and as heir of her deceased husband, was entitled to pre-emption in preference to the vendees, who were only sharers in the same *thoke* as the vendor.

Khuman Singh v. Hardai . . . . . 41

*Wajib-ul-arz—Muhammadan Law—Refusal by pre-emptor to purchase—Immediate demand—Pre-emptor claiming property as to part of which he has disqualified himself from suing.* The *wajib-ul-arz* of a village provided that a co-sharer wishing to sell his share must give notice to the other co-sharers,

and that first a nearer co-sharer, and next a more distant co-sharer, should have a right of pre-emption. Where, such notice having been given, the co-sharer receiving notice took no action thereon within a reasonable time,—*held* that as his inaction would lead the vendor to conclude that he would not interfere or become a purchaser, it was equivalent to declining to purchase.

A sale of property, to which the Muhammadan law of pre-emption was applicable, took place in October 1884. The plaintiff pre-emptor and his agent became aware of the sale shortly after it took place, and many months prior to July 1885. He did not allege that he had given notice that he claimed to exercise his right of pre-emption before July 1885. It was found as a fact that no such notice was given.

*Held* that, even if such notice was given, it was too late, and was not a prompt demand in accordance with the Muhammadan law.

The principle of the rule that a pre-emptor must claim the whole of the property included in the sale transaction, and for which one price was paid if he is entitled to claim it, and cannot obtain a decree for part only of such property, applies to the case of a pre-emptor who claims the whole, but who is at the time disentitled by his own act or laches to maintain the claim as to a part. Such a disqualification prevents the pre-emptor from maintaining his suit for any portion of the property included in the sale.

Where, therefore, a pre-emptor was disqualified from claiming a portion of the property sold by not having made a prompt demand in accordance with the Muhammadan law in respect of such portion,—*held*, that he was thereby prevented from maintaining his suit for another portion claimed under the provisions of the *wajib-ul-arz* of a village, though he was willing to pay the full purchase-money and to leave in the vendee's hands the portion as to which he was disqualified.

Muhammad Wilayat Ali Khan v. Abdul Rab . . . . . 108

PRINCIPAL AND SURETY. *See* Act IX of 1872, ss. 134, 137.

QUESTION IN ISSUE. *Parties—Admission.*] The plaintiff claimed to have inherited estate in the possession of the defendant, who was also related to the last owner, but who set up, independently of other title, a deed of gift from the latter in his favour. It was decided in the Appellate Court that even if this deed had been executed, it was inoperative, and on this point the decision of the first Court was maintained. An issue having been fixed as to the execution and the plaint also showing that the execution was disputed, their Lordships declined to treat the execution as not having been in contest.

Anand Kumar v. Tansukh . . . . . 396

RECORD OF RIGHTS—*Mutation of names.* *See* Act XIX of 1873, ss. 94, 97.

REGISTRATION. The plaintiff sued (i) for registration of a hypothecation bond executed by the defendant, (ii) in the alternative for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts.

*Held*, that this decision was wrong, and that the plaintiff was entitled to sue upon the account stated. *Sirdar Kuar v. Chandrawati* distinguished.

Where two parties enter into a contract of which registration is necessary, it is essential that each should do for the other all that is requisite towards such registration.

Kiam-ud-din v. Rajjo . . . . . 13

REGISTRATION. *See* Act III of 1877, ss. 49, 60.

\_\_\_\_\_, PLACE OF. *See* Act VIII of 1871, ss. 28, 64, 65, 66.

REGULATION XVII of 1806, s. 8. *See* Mortgage and Pre-emption.

REMAND. *See* Act XII of 1881, s. 208.

\_\_\_\_\_. *See* Civil Procedure Code, ss. 562, 578.

RES JUDICATA. *See* Civil Procedure Code, s. 13.

\_\_\_\_\_. *See* Decree, amendment of.

\_\_\_\_\_. *See* Mortgage, usufructuary (2).

REVIEW OF JUDGMENT. *See* Decree, amendment of.

SECURITY BOND FOR COSTS OF APPEAL. *Act I of 1879, sch. i, No. 13—Act VII of 1870, sch. ii, No. 6.] Held* by the Full Bench that where a bond is given under the orders of a Court as security by one party for the costs of another, it is subject to two duties—(a) an *ad valorem* stamp under the Stamp Act, art. 13, sch. i, (b) a court-fee of eight annas under the Court Fees Act, art. 6, sch. ii.

Kulwanta v. Mahabir Prasad . . . . . 16

SMALL CAUSE COURT SUIT. *See* Civil Procedure Code, s. 586.

STATUTES, 24 AND 25 VIC., c. 67, s. 22. *Legislative power of the Governor-General in Council—Act XVII of 1886 (Jhansi and Morar Act—"Indian territories now under the dominion of Her Majesty"—"Said territories"—28 and 29 Vic., c. 17, preamble—32 and 33 Vic., c. 98, s. 1—Construction of statutes.] Act XVII of 1886 (Jhansi and Morar Act) is not ultra vires of the Governor-General in Council; and the town and fort of Jhansi are subject to the jurisdiction of the High Court for the N.-W. Provinces in the same manner as the rest of the Jhansi district.*

The Governor-General in Council has power to make laws and regulations binding on all persons within the Indian territories under the dominion of Her Majesty, no matter when such territories were acquired. His legislative powers are not limited to those territories which at the date when the Indian Councils Act (24 and 25 Vic., c. 67) received the royal assent (*i.e.*, 1st August 1861), were under the dominion of Her Majesty. In the preamble to the 28 and 29 Vic., c. 17, and in s. 1 of the 32 and 33 Vic., c. 98, Parliament has placed this construction upon s. 22 of the Indian Councils Act.

Even if that construction was erroneous, it has been so declared by Parliament as to make its adoption obligatory. Though a mistaken opinion of the Legislature concerning the law does not make the law, yet it may be so declared as to operate in future. *The Postmaster-General of the United States v. Early* referred to.

It must be presumed that the laws and regulations of the Governor-General in Council are known to Parliament. *Empress v. Burah* referred to.

Abdulla v. Mohan Gir . . . . . 490

STATUTES, 28 AND 29 VIC, c. 17, PREAMBLE. *See* 24 and 25 Vic., c. 67, s. 22.

\_\_\_\_\_, 32 AND 33 VIC., c. 98, s. 1. *See* 24 and 25 Vic., c. 67, s. 22.

STATUTE, CONSTRUCTION OF. *Preamble.] Where the enacting sections of a statute are clear, the terms of the preamble cannot be called in aid to restrict their operation or to cut them down.*

Queen-Empress v. Inderjit . . . . . 262

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SUMMARY TRIAL. See Criminal Procedure Code, s. 260, and Act XIII of 1869.

SUIT FOR SPECIFIC PERFORMANCE. *Exchange—Agreement that if either party were deprived of land received he should receive other land—Act XV of 1877, sch. ii, No. 113.]* In 1871 the plaintiffs and the defendants executed a deed whereby they effected an exchange of certain lands, and each party agreed to resist by legal process or by bringing an action any claim or interference with the other in respect of the property exchanged, and to bear the costs which might be incurred in such legal proceedings in certain proportions, and that, if as a result of such proceedings either of the parties were deprived of the lands exchanged or any part of them, the other should make it up out of certain of his own land. In 1881 the plaintiffs brought an action against a third party who claimed title to some of the exchanged lands, and joined the defendants as defendants, the latter admitting the plaintiffs' title. The plaintiffs were defeated in that suit in 1882. In 1885 (within three years from the time the defendants refused to give them other land) they sued on the deed of 1871 to have the exchange therein provided for carried out.

*Held*, by the Full Bench, that the cause of action arose in 1882, when there was a loss to the plaintiffs in the sense contemplated in the deed, and the defendants were called upon specifically to perform their covenant, and that the present suit having been brought within three years after their refusal to perform it was within the time fixed by art. 113, sch. ii. of the Limitation Act (XV of 1877).

Hari Tiwari v. Raghunath Tiwari . . . . . 27

TRUST FOR PUBLIC RELIGIOUS PURPOSES. *Private trust—Suit by worshipper of Hindu temple relating to trust—Right to sue—Civil Procedure Code, ss. 30, 539—Act XX of 1863—Hindu Law.]* The defendants made a gift of land to a Hindu temple for the purpose of defraying the expenses appertaining to the idol. The temple was built and the gift made in 1870. The defendants obtained from the revenue authorities mutation of names in the idol's favour, and an acknowledgment of the person whom they nominated as agent or manager. The plaintiff, alleging that they had subsequently repossessed themselves of the land and the profits accruing therefrom, and that he was interested as a Hindu in worshipping at the temple, and professing to sue on behalf of the entire body of the worshippers thereat, sued for a declaration that the land was *wakf*, and the idol entitled to hold it in his own name; that the defendants should be directed to apply the income of the property to the purposes of the temple, and that the Court should give such orders and instructions as might be necessary and proper for the future management of the temple and payment of income. No sanction to the institution of the suit was obtained under s. 539 of the Civil Procedure Code.

*Held* by the Full Bench, that the gift made by the defendants constituted a trust for the purposes of the temple.

*Per* EDGE, C. J., and TYRELL, J., that the defendants before the Court did not constitute themselves trustees in any sense.

*Held*, also by the Full Bench, that the suit was not maintainable as against those defendants.

*Per* STRAIGHT, J., that the suit was not maintainable under the Hindu Law; that the trust was one for public religious purposes; that such a suit, in which

the plaintiff asked to have the trust administered by the Court, could not be maintained without the sanction required by s. 539 of the Code; that assuming s. 539 to be inapplicable, and Act XX of 1863 to apply, the suit could not be maintained without the sanction required by that Act; and that, with reference to s. 30 of the Code, no cause of action had accrued to the plaintiff alone on which he could maintain the suit.

*Per* EDGE, C.J., and TYRELL, J., that if the trust were one for public religious purposes, the suit as against the defendants before the Court must fail for non-compliance with the provisions of s. 539 of the Code, and if for private or *quasi*-private religious purposes, it must also fail, since there was no principle on which the plaintiff, as one of the public worshipping in the temple could maintain it against those defendants who were not trustees, but (if they had wrongfully taken possession) trespassers; that Act XX of 1863 could not apply; and that, with reference to s. 30 of the Code, the plaintiff could not maintain the suit alone on his own behalf, or on behalf of himself and others against those defendants.

*Jawahra v. Akbar Husain* distinguished. *Manohar Ganesh Tambekar v. Lakmiram Govind Ram, Lutifunissa Bibi v. Nazirun Bibi, and Hira Lal v. Bhairon* referred to. *Wajid Ali Shah v. Dinanathulla Beg* approved.

Raghubar Dial v. Kesho Ramanuj Das . . . . . 18

**UNCONSCIONABLE BARGAIN.** *Gambling in litigation—Agreement opposed to public policy—Act IX of 1872 (Contract Act), s. 23.* For the purpose of meeting the expenses of an appeal to the Privy Council from concurrent decrees of the Subordinate Judge and the High Court, the plaintiff-appellant executed a deed of sale of certain property worth over Rs. 50,000 in consideration of the vendees providing the necessary security and moneys. The plaintiff experienced considerable difficulty in procuring the means of appeal. The vendees were not professional money-lenders, they did not put pressure on the plaintiff, but, on the contrary, he and his agent put pressure on them to agree to the terms of the deed. It appeared that, apart from the moneys borrowed by him from time to time, he was without even the means of subsistence; that he fully understood the nature of the deed; that his agents negotiated the transaction *bona-fide*, and to the best of their powers, in his interest: that there was no fraud or deception on the part of the vendees; and that they performed all that they undertook as regards meeting the expenses of the appeal. Under the deed the plaintiffs were liable to furnish security to the extent of Rs. 4,000 and to advance Rs. 8,500 for other necessary expenses, and they did in fact furnish such security, and advanced sums aggregating Rs. 7,542. The appeal was successful. The appellant having failed to put the vendees in possession of the property conveyed by the deed and recovered by him under the Privy Council's decree, the vendees sued him for possession of the property and meane profits, afterwards agreeing that the Court should, in lieu thereof, award them compensation in money equivalent thereto.

*Held* that, although the case was very different from cases in which persons interfered for their own benefit in litigation not their own, or in which mukhtars, vakils or persons of that class or professional money-lenders, taking advantage of the borrower's position, sued to enforce a contract obtained by them from him, and although the defendant was not entitled to sympathy, yet, judging by the disproportion between the liability incurred by the plaintiffs under the contract and the reward which they were to obtain in the event of defendant's success, it must be concluded either that they did not believe his claim to be well founded, and consequently entered, though unwillingly, into a gambling transaction, or, if they believed the claim to be well founded, that the reward contracted for was excessive and unconscionable; and in either case the contract could not be enforced in its terms.

*Held* also, that, if the doctrine of equity applicable to such cases were applied in favour of the borrower, it should also be applied in favour of the lender; that as there was no reason to suspect the plaintiff's motives, it would be inequitable to relieve the defendant from all liability; that it was only fair that he should compensate the plaintiffs for the use of their security bonds from the date when they were deposited in the High Court to the earliest date after the judgment of the Privy Council when the plaintiffs could have obtained them back; that simple interest at 12 per cent. per annum on the amounts of the bonds for the period would be reasonable compensation for such use; that the defendant should also repay the amounts advanced by the plaintiffs for the expenses of the litigation with interest on each advance at 20 per cent. from the date on which it was made to the date of the decree in the present case; and that he should pay interest on the whole amount thus decreed at 6 per cent. from the date of the decree till payment.

*Chunni Kuar v. Rup Singh, Raja Sahib Prahlad Sen v. Babu Bhadu Singh and Bouses v. Heaps* referred to.

*Loke Indar Singh v. Rup Singh* . . . . . 118

**UNCONSCIONABLE BARGAIN.]** The result of the English cases regarding "hard" or "unconscionable bargains" is that in dealings with expectant heirs, reversioners or remaindermen, the fact that the bargain was declined by others as not being sufficiently advantageous does not raise a presumption that it was fair and reasonable; and that until the contrary is satisfactorily proved by the party trying to maintain the bargain, the Court may presume that a bargain which apparently provides, in the opinion of the Court, for an unusually high return or for an exceptionally high rate of interest, is a hard and unconscionable bargain against which relief should be granted. The doctrine of equity on the subject of such bargains is applicable in England only to dealings with expectant heirs, reversioners or remaindermen. The judgment of the Privy Council in *Srimati Kamini Sundari Chaudhrani v. Kali Prossunno Ghose* does not imply that the doctrine is to be applied in India to cases except where it would have been applied in England, or except where the case is in some way analogous to a case of snatching a bargain with an expectant heir, reversioner or remainderman, or except there is some fiduciary relationship between the lender and the borrower, although there may be no fraud or undue influence, or except there is some incapacity, such as ignorance, on the part of the borrower to appreciate the true effect of his bargain.

For the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal advisers, executed a bond for Rs. 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs. 25,000, upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time, he was without even the means of subsistence; that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him; that no fraud or improper pressure appeared to have been applied to him; that his legal advisers had acted honestly and to the best of their ability in his interests; that there was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond; that without such assistance he could not have appealed to

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the High Court; and that the obligee gave him such assistance upon his application.

*Held*, that although there was nothing to show that the obligor could have obtained an advance on terms more advantageous to himself, it was for the obligee to establish to the Court's satisfaction, without reasonable doubt, that he could not have done so; and that, this not having been established, and the reasonableness and fairness of the bargain not being proved by showing that there have been difficulties in negotiating it, or that others had refused it as not sufficiently advantageous to them, the Court should hold the bargain to be a hard and unconscionable one, which should not be enforced.

The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 per cent. per annum from the date of the bond to the date of the decree, with costs, in proportion, and interest at 6 per cent. per annum on the Rs. 3,700, interest and costs, from the date of the decree until payment.

Chunni Kuar v. Rup Singh . . . . . 57

**VENDOR AND PURCHASER.** *Part payment of purchase-money—Execution, registration and delivery of sale-deed—Completion of sale—Right of purchaser to sue for possession—Act IV of 1882, s. 54.* Non-payment of the purchase-money does not prevent the passing of the ownership of the property sold from the vendor to the purchaser; and the latter, notwithstanding such non-payment, can maintain a suit for possession of the property, subject to such equities, restrictions or conditions as the nature of the case may require. *Mohun Singh v. Shib Koonwer, Goor Parshad v. Nunda Singh, Heera Singh v. Ragho Nath Sakai and Umedmal Motiram v. Dawa* referred to.

The difference between an executed contract of sale and an executory contract to sell observed on. *Ikkal Begam v. Gobind Parshad* dissented from.

A deed of sale of immoveable property having been duly executed and registered and delivered, and the purchaser having paid a portion of the purchase-money to the vendor's creditors—*held*, with reference to s. 54 of the Transfer of Property Act (IV of 1882), that these facts amounted to a full transfer of ownership, and the purchaser could maintain a suit for possession of the property sold, notwithstanding that he had not paid the balance of the purchase-money to the vendor or to a mortgagee of the property, as stipulated in the deed.

Shib Lal v. Bhagwan Das . . . . . 244

**WAIVER.** See Execution of decree.

**WAJIB-UL-ARZ.** *Pre-emption—Partition of village into separate maháls.* Cases where, after the division of a village area into separate maháls for which no new *wajib-ul-arz* is drawn up, the old *wajib-ul-arz* for the whole area has been held to apply generally to the new maháls, and such division has been held not to effect covenants existing between the co-sharers under such *wajib-ul-arz*, distinguished from cases where a new *wajib-ul-arz* has after the division been drawn up for each mahál. *Gokal Singh v. Mannu Lal and Jai Ram v. Mahabir Rai* referred to.

Kuar Dat Parsad Singh v. Nahar Singh . . . . . 257

See Pre-emption.

*Ex. L.P.B.*











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